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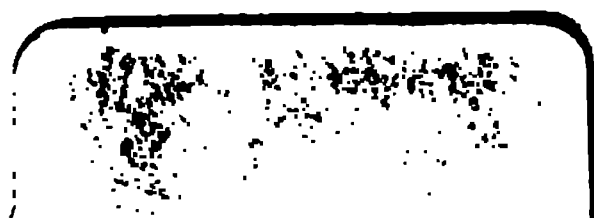
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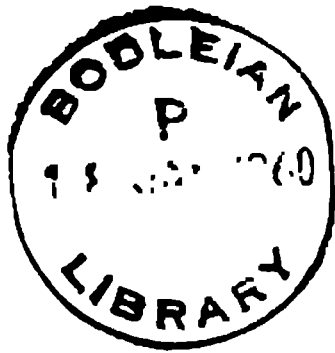
THE
ONTARIO REPORTS,
VOLUME VII.
CONTAINING
REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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COMMON PLEAS DIVISIONGEORGE F. HARMAN,
BARRISTERS-AT-LAW.

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OF THE
HIGH COURT OF JUSTICE,
DURING THE PERIOD OF THESE REPORTS.

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REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

BANK OF TORONTO V. COBOURG, PETERBOROUGH, AND
MARMORA RAILWAY COMPANY ET AL.

Railways—Debentures—Issue in blank—Subsequent insertion of payee's name—Estoppel—"Negotiating"—38 Vic., c. 47, O.

The C. P. & M. Railway company being authorized by 38 Vic. c. 47, O. to issue preferential debentures, the holders of which, it was enacted, might, on default in payment, obtain a foreclosure or sale of the railway by suit in Chancery, the directors passed a by-law enacting that such debentures should be issued, under the seal of the company, and should "be negotiated from time to time as the proceeds thereof shall be required for the purposes of the company by the managing director."

Debentures were accordingly issued in blank, and handed to the managing director, who, subsequently, the railway being indebted to the plaintiff, delivered certain of them to the latter, as security for such debt.

The debentures were in the following form:

Debenture.

No.

The C. P. & M. Railway Company owes the Bank of Toronto, or order, the sum of \$1,000 payable in ten years * * * with interest at 8 per cent per annum, payable half-yearly, on presentation of the proper coupons hereto attached.

The name, Bank of Toronto, was not filled in until about the time of delivery to the plaintiffs, who now brought this action for an account of what was due under the debentures and payment, or, in default, a sale by the Court of the property of the company.

Held, that the debentures were valid, and judgment must go as asked.

The strict rules of the common law relating to deeds are not applicable to such debentures, but rather the rules of the law merchant relating to

negotiable securities. But if this were not so, the fact that the name, Bank of Toronto, was not filled in until delivery to the plaintiffs did not make the debentures void ; it would come within that class of cases where deeds have been held good, notwithstanding an alteration or subsequent addition, because, at the time of execution, there was something which could not be ascertained, and was therefore to be filled up afterwards. Here, however, there was no execution, which imports delivery, prior to the time when the name was filled in.

Held, also, that, though the debentures were under seal, this did not detract from their character, which was rather that of promissory notes than of mortgages ; and though the Act made them a charge on all the property of the company, with a right of foreclosure and sale, this was something superinduced upon the security by virtue of the statute.

Held, further, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and the company would be estopped from relying on such defences as the above.

Held, lastly, that inasmuch as it appeared that these debentures were delivered with a view to facilitate the company's operations in getting out and disposing of ore, the main branch of its business, this was a "negotiation" of them "for the purposes of carrying on the company's business," and so within the meaning of the aforesaid Act and by-law.

THIS was an action brought by the Bank of Toronto who sued on behalf of themselves and others holders of debentures of the defendants the Cobourg, Peterborough, and Marmora Railway and Mining Company of the same class, against that company, and the Midland Railway of Canada, claiming an account of what was due to them from the first-named defendants on a certain judgment obtained by them, and also of the amount of interest overdue and unpaid upon certain debentures held by them, the plaintiffs ; and that the first-named defendants be ordered to pay the amount of the interest so found due, or in default that their railway be sold, under direction of the Court, and the proceeds applied in payment of the said debentures ; and that a receiver of the revenues of the said defendant company be appointed until such sale should be effected ; and for general relief.

The circumstances of the case were as follows :—On December 21st, 1874, the Act 38 Vic. c. 47, O., was passed, which after reciting that the Cobourg, Peterborough, and Marmora Railway and Mining Company had petitioned that the directors of the company might be authorized to issue preferential debentures for the purpose of carrying on

the business of the company and completing its works, proceeds to authorize the directors to issue debentures to the amount of \$300,000, which should be a first charge upon the railway and undertaking, and upon all the property and revenues of the company, in priority to certain other debentures theretofore issued by the company, which latter debentures were thereby made a second and third charge respectively on the said railway.

By section 7 it is enacted as follows :—

In case at any time there shall be default for more than one month in the payment of any instalment of interest or of principal on any of the debentures of any of the said three classes of debentures, the holder of such debentures of any one of the said three classes to the amount of not less than \$50,000, may on behalf of himself and of the other holders of debentures of the same class, proceed in the Court of Chancery for and obtain a foreclosure or sale of the said premises, the subject of the charge created in favour of the debentures of the said class.

On February 5th, 1875, the Board of Directors aforesaid accordingly duly passed a by-law to provide for the issue of \$300,000 of debentures of the railway under the provisions of the above Act, wherein, after reciting the provisions of the said Act, and that it was expedient to issue the debentures so authorized in accordance with its provisions, it was enacted as follows :—

1. That the debentures of the said company authorized to be issued by the said in part recited Act to the amount of \$300,000, shall be issued in sums of \$1,000, each, payable in ten years from January 1st, 1875, in lawful money of Canada, with interest thereon from the said last mentioned date at the rate of eight per centum per annum, payable half yearly, in like lawful money.

2nd. That such debentures shall be under the seal of the said company, and shall be signed by the President and countersigned by the Treasurer thereof, and shall be payable at the office of the Bank of Toronto in Toronto, and shall be in such form as the President of the said company shall determine.

3rd. That the said debentures shall be negotiated from time to time as the proceeds thereof shall be required for the purposes of the company, by the Managing Director of the said company, on such terms as he shall see fit.

On February 1st, 1876, the defendants the Cobourg, Peterborough, and Marmora Railway and Mining Company, through their Managing Director, Mr. Chambliss, delivered to the plaintiffs one hundred of the said debentures, duly executed and issued pursuant to the above by-law, to be held by them for the payment of a certain debt owing by the railway to the plaintiffs, and of certain promissory notes of the railway, of which the plaintiffs were the holders.

The form of these debentures, so delivered to the plaintiffs, was as follows :—

Issued under the Act of the Parliament of the Province of Ontario, passed in the 38th year of Her Majesty's Reign, chaptered 47, and a charge upon all the properties of the company.

Debenture.....No.

The Cobourg, Peterborough, and Marmora Railway and Mining Company owe the Bank of Toronto or order the sum of \$1,000, payable in ten years from the first day of January in the year of Our Lord, 1875, at the Bank of Toronto, in Toronto, with interest at the rate of eight per centum per annum, payable half yearly, on the presentation of the proper coupon hereto attached.

As witness the seal of the said company the first day of April, A.D., 1875.

W . CHAMBLISS,
Treasurer.

W. J. MUIR STANTON,
President.

There were attached coupons for the half yearly amounts of interest.

Across the face of the debentures was printed the words "First preference debenture."

On July 16th, 1880, the Cobourg, Peterborough, and Marmora Railway and Mining Company leased a certain portion of their line to the Grand Junction Railway Company for a term of years not expired at the time of the bringing of this action, which lease was by 44 Vic. c. 64, O. declared to be legal and binding, subject and without prejudice to the bonds of the former railway, and the rights of any holder of such bonds.

By 45 Vic. c. 67, O., by agreement therein mentioned and thereby ratified, the Grand Junction Railway Company

and five other railway companies were consolidated in one railway company, under the name of the Midland Railway of Canada, and it was provided thereby that all the corporate powers, franchises, and privileges of the said several companies should vest in and become the powers, franchises, and privileges of the said consolidated company.

The plaintiffs now brought this action against the above-named defendants, setting out the circumstances above-mentioned, and that on November 15th, 1882, they brought an action against the present defendants in the Chancery Division, upon the said promissory notes so held by them, and on December 28th, 1882, recovered against the said defendants a judgment in the said action for \$68,146.52, being the amount then due and owing on the said notes, which judgment was still in full force and wholly unsatisfied. That more than \$43,840 was overdue and unpaid for interest on the said debentures so held by them; and that by virtue of 38 Vic., c. 47 aforesaid, they were entitled to a sale of the railway and properties of the defendants the Cobourg, Peterborough, and Marmora Railway and Mining Company, the subject of the charge created by that statute in favour of such debentures; and they claimed as above mentioned.

By their statement of defence the defendants alleged, amongst other things, that the plaintiffs were not the legal holders of the debentures claimed by them, or if they held them they were not entitled thereto, nor to make any claim in respect thereof. And they further said that the only power which they had conferred upon them, with respect to the said alleged debentures, was a power to sell the same as the purposes of the company required the moneys to be received therefrom; and they said that if the plaintiffs had the said alleged debentures, or any of them, in their possession, they obtained the same without any consideration or value given therefor, and from some person or persons unauthorized to so deal therewith, and they claimed that the said alleged debentures should be handed over to them.

The case was tried at Toronto, on January 12th, 1884, before Boyd, C. (a)

Mursh, for the defendants the Cobourg, Peterborough, and Marmora Railway Company. Mr. Chambliss (b) was not authorized to hand over the debentures to the plaintiffs. See the recital of the Act 38 Vic. ch. 47, O., which limits the purposes for which the debentures could be issued. His only authority was under the third clause of the by-law. The debentures could not be deposited or used to secure a pre-existing debt. "Negotiated" in the third clause of the by-law means that the debentures should be turned into money or advances obtained upon them. The debentures were perverted from the purpose contemplated by the Act authorizing them. Moreover they are void, because the name of the Bank of Toronto was not filled up until they were negotiated, although they were before that completed in every other respect. I refer also to *Sheppard's Touchstone*, p. 543; *Hibblewhite v. McMorine*, 6 M. & W. 200; *Swan v. North British Australasian Co.*, 7 H. & N. 603.

C. Robinson, Q.C., *D. McCarthy*, Q.C., *S. H. Blake*, Q.C., *C. Moss*, Q.C., and *T. G. Blackstock*, for the plaintiffs. The payment of the debts of the company was a proper application of the money raised by the debentures, and they were not *ultra vires*. Though the proceeds were applied in payment of a past debt, the debentures are as good as if a present advance had been made. We refer to *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82; *Romford Canal Co.*, L. R. 24 Ch. D. 85; *Re Tahiti Cotton Co.—Ex parte Sargent*, L. R. 17 Eq. 273; *Jones on Railroad Securities* (1879), sec. 197; *Simson v. Bazett*, 2 M. & S. 94;

(a) At the commencement of the trial the learned Chancellor ruled that the *onus* was on the defendants to shew the illegality of the bonds. *Dillon on Municipal Corporations*, 1st ed., sec. 426, was referred to on this point.

(b) Mr. Chambliss was President, Managing Director, and Treasurer of the Marmora Railway Company.

France v. Clark, L. R. 22 Ch. D. 830; *Re Patent File Co.*, *Ex parte Birmingham Banking Co.*, L. R. 6 Ch. 83; *Bank of Montreal v. Baker*, 9 Gr. 298; *Sayles v. Brown*, 28 Gr. 10; *Sommerville v. Rae*, *ib.* 618; *Geddes v. Toronto Street R. W. Co.*, 14 C. P. 513; *Re Meredith's Trusts*, L. R. 3 Ch. 757; *The Canadian Bank of Commerce v. Gurley*, 30 C. P. 583; *Brice on Ultra Vires*, Am. ed., p. 267-8.

J. Bethune, Q. C., and *W. H. Biggar*, for the defendants, the Midland Railway Company in reply. Persons taking the debentures were bound to know the contents of the by-law. These debentures are deeds and not negotiable instruments in any sense, as they are a charge on the land. They are not directed by the Act to be made payable to order or bearer. They contain a condition as to the presentation of coupons; moreover they contain no words of promise. Thus this case is distinguishable from the cases cited. The doctrine of estoppel cannot apply, because there was no new consideration, the debentures were merely given as security for an old debt. There was no giving of time, nor is there evidence of forbearance, constituting a fresh consideration. It was a breach of trust in Mr. Chambliss to hand them over. To negotiate a bill is "to transfer it for value:" *Blakiston v. Dudley*, 5 Duer 373.

January 19th, 1884. BOYD, C.—The securities in question are of a somewhat anomalous character. As a matter of definition, "debenture" merely means an instrument which shews that the party owes and is bound to pay: per *Martin, V. C.*, in *The Imperial Land Co. of Marseilles, Ex parte Colborne and Strawbridge*, L. R. 11 Eq. 478, or, as more concisely put in *Skeat's Dictionary*, it is "an acknowledgment of a debt." Etymologically *debenture* is but *debt* "writ large." At first, during the Protectorate, when the term seems to have originated, it was spelled "*Debenter*," that being the Latin word with which the instrument began. 38 Vic., ch. 47, O., under which these were issued, does not prescribe the form, nor does the company's

by-law, which directs that they shall be in such form as the president of the company shall determine. The form they do assume indicates that they are payable to "the Bank of Toronto or order." This is carrying out the clause of the by-law which directs that the debentures "shall be negotiated from time to time." As said by Mr. Justice Blackburn, in *Griffin v. Weatherby*, L. R. 3 Q. B. 760, "negotiating must mean doing something which can only be done with a negotiable instrument," and, in the same case, Mr. Justice Lush, says, "by *negotiated* I understand to mean passed away from the original holder to another person." Having regard to the current of decision it is evident that the law imputes as a predominant characteristic to these documents the quality of negotiability, enabling the person holding them to recover without regard to any equities that might exist between the company and prior holders or the original obligees.

Looking at these particular debentures, they are strictly, on the face of them, negotiable instruments. The fact that they are sealed does not detract from their character being rather that of promissory notes than of mortgages. The Act, no doubt, makes them a charge on all the properties, real and personal of the company, with a right of foreclosure and sale, but that is something superinduced upon the security by virtue of the statute. The combined effect of the debenture and the statute is not dissimilar to that of the kind of security which was before the Court. in *Higgs v. Northern Assam Tea Co.*, L. R. 4 Ex. 387, where bonds of the company were secured by a covering mortgage upon lands expressed to be for the benefit of the holders for the time being of the debentures. (See per Kay, J., *In re Romford Canal Co.*, 24 Ch. Div. 91). That is the effect of the present debentures, which, giving the right to a judgment for the debt, are by the Legislature extended into a charge upon the whole undertaking. The difficulty of classifying this kind of security is shewn by the cases already cited, and others such as *Re General Estates Co.*, *Ex parte City Bank*, L.R. 3 Ch. 758, and *British India*

Steam Navigation Co. v. Commissioners of Inland Revenue, 7 Q. B. D. 172, and *Attree v. Hawe* 9 Ch. D. 337.

It would be, in my opinion, an entirely retrograde movement to apply to debentures such as those now in question the strict rules of Common Law relating to deeds, rather than the rules of the law merchant applicable to negotiable securities. But even testing the point of objection that the name "Bank of Toronto," was not filled in till about the time of delivery to the plaintiff by the case relied on by Mr. Marsh, it would not warrant me in adjudging that the debentures were void. In *Hibblewhite v. McMorine*, 6 M. & W. 200, the Court held that by the terms of the statute in question there, the instrument of transfer must be by deed under the hands and seals of both parties, and they held that a deed with the name of the vendee in blank at the time it was sealed and delivered was void; and they held further that it was not possible to validate it by filling in the vendee's name afterwards by an agent appointed by parol; and they end by denouncing what was done as an attempt to make a deed transferable and negotiable like a bill of exchange, or an exchequer bill, which the law does not permit. The point of that case is, that the instrument was delivered in an imperfect form, and was therefore void. Here the instrument when handed to the bank was complete in all its parts, and the statute does not say it shall be a deed. The debentures were made out in blank at first, because it was not known to whom they would be delivered, and the third clause of the by-law provides for just such a completion of them as was made in this case. It is thereby provided "that the said debentures shall be negotiated from time to time, as the proceeds thereof shall be required for the purposes of the company, by the managing director of the said company, on such terms as he shall see fit."

Mr. Chambliss, the only witness examined, and whose evidence is relied on to shew the illegality and invalidity of the debenture, was the managing director; he was also treasurer of the company, and counter-signed the securities

in that character ; he was also secretary, and signed the by-law in that character ; and I assume in the absence of evidence that he was the custodian of the company's seal. It was, therefore, no unauthorized or illegal act for this functionary to fill in the name of the person who was not ascertained at an earlier date, so as to render the debentures (what was intended by the company) negotiable securities, because after the written name "Bank of Toronto," are the printed words "or order." If, then, the law as to deeds applied, it would be that class of cases referred to by the counsel who argued *Hibblewhite v. McMorine*, at p. 211, where deeds have been held good notwithstanding an alteration, or subsequent addition, because at the time of the execution there is something which cannot be ascertained, and is, therefore, to be filled up afterwards. See *Bank of Montreal v. Baker*, 9 Gr. 97. But as I have pointed out, there was really no *execution* here, which imports delivery, prior to the time when the name was filled up, and the security was to be negotiated. That was the time when by the direction of the company the officer who had the custody of the company's seal was to complete the debentures which had been previously incomplete. So far from violating any rule of law, it was essential for the company to have the instruments in such a shape as that they would be transferable like a bill of exchange. Therefore, my conclusion is that every reason given from the decision in *Hibblewhite v. McMorine*, fails of pertinence when sought to be applied to this case ; and I am prepared to hold that if the company issued debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete the instruments by the insertion of the obligee's name, and the company would be estopped from relying upon such a defence, even if it were explicitly pleaded.

On the other point argued I am of opinion that the debentures, when handed to the plaintiff, were not perverted from the purpose contemplated by the Act. That is, as shewn

by the preamble, to enable the company to carry on its business and complete its works. As I view the evidence, it establishes that these securities were handed over in pursuance of the correspondence which was put in, and after several interviews between the managing director and the local agent of the bank at Cobourg. From that correspondence it is quite evident that the main branch of the company's business (*i.e.*, getting out and disposing of ore), was being prosecuted at that time, and that these securities were delivered with a view to facilitate the company's operations. That was within the scope of the powers entrusted to the managing director by the by-law, and might have served the objects of the company as well as by raising money on the debentures: *Re Inns of Court Hotel Co.*, L. R. 6 Eq. 82, and *Re Patent File Co., Ex parte Birmingham Banking Co.*, L. R. 6 ch. 83. Judgment will be as prayed, with costs of suit.

Since writing this I have come across the case of *Grenfell v. Commissioners of Inland Revenue*, 1 Ex. D. 242, where a railway bond in blank was treated as a valid security by the Court. From that case, I infer either that the debentures in question might be in blank or that they were not issued within the meaning of the by-law till the payee's name was inserted.

A. H. F. L.

[CHANCERY DIVISION.]

KINCAID V. READ ET AL.

Husband and wife—Liability of wife for husband's contract—Potential equity.

Plaintiff agreed with J. R. to build a house on certain land for \$850. After building the house he discovered that the land belonged not to J. R. but to J. R.'s wife, who, at the time of the agreement, was an infant, and was in no way a party to it. Afterwards J. R. and his wife sold and conveyed the land and house to M., an innocent purchaser. The plaintiff was only paid a portion of the \$850, and now brought this action to recover the balance from the wife of J. R., or the amount by which the building had enhanced the value of the land.

Held that inasmuch as there was no property or fund transferred or settled upon the wife that would have been liable to seizure by a creditor, the plaintiff could not recover against her.

THIS was an action brought by John Kincaid against Margaret Jane Read and John Read defendants, claiming payment of a certain sum of money alleged to be due to him for the erection of a dwelling house.

In his statement of claim he set up that some time prior to December 17th, 1879, the defendant M. J. Read was seized in fee simple of certain lands in the township of Emily: that the defendant J. Read was her husband, and had at the time the contract thereafter referred to was entered into, and for some time subsequent to the completion of the same, the entire management of her property, and acted for her in all matters of business pertaining thereto: that about 1878, J. Read "with the knowledge and consent, and acting as the agent of the defendant M. J. Read, employed the plaintiff to erect a dwelling house" and agreed to pay him \$850 therefor: that he built the house, and the defendants entered into the occupation of it: that he had only received \$163 out of the \$850: that the erection of the said dwelling house had very greatly enhanced the value of the lands on which it was built: that by deed dated December 17th, 1879, the defendants sold the said lands to one A. McQuade for \$3300: that the erection of the house materially assisted the defendants in selling as

aforesaid, and he, the plaintiff, should be paid the balance of \$850, or the amount by which the value of the said lands was increased by the erection of the house.

The last two clauses of the statement of claim were as follows:

9a. The plaintiff charges that the defendant J. Read was the agent of his wife, the defendant M. J. Read, and that the said agreement, although entered into with the defendant J. Read, was made for his said wife—an undisclosed principal—and in her behalf; and that the defendant M. J. Read has reaped the benefit derived from said contract, although she now fraudulently seeks to escape payment of the amount due to the plaintiff thereunder.

9b. The defendant J. Read was at the time of entering into said agreement and still is an insolvent."

And the plaintiff claimed payment of so much of the \$850 as was still due him for the erection of the house according to the agreement, or of the amount by which the value of the said lands and premises was increased by such erection.

The defendant M. J. Read delivered a statement of defence, admitted her ownership of the land, and that J. Read was her husband, but denied that he acted for her in regard to her property or had the entire management of it, or that she employed the plaintiff to erect the house, or agreed to pay him for doing so. She also pleaded that at the time the house was built and up to February 21st, 1879, she was an infant, and had in no way confirmed any agreement respecting the erection of the house since reaching maturity: that J. Read was not her agent for the purpose of entering into the agreement, or authorized to pledge her credit in any way for the construction of the house.

The plaintiff joined issue on this defence.

The rest of the facts of the case fully appear in the judgment.

The action was tried at Lindsay on November 11th, 1882, before Ferguson, J.

S. H. Blake, Q.C., and *Hudspeth*, Q.C., for the plaintiff. There was here a voluntary settlement made by the husband on his wife, when he was not in a position to make one. The infancy of the female defendant does not affect the matter. It is a question of a voluntary settlement. There is a peculiar equity in favour of the plaintiff, whose money is in the house. We refer to *Jackson v. Bowman*, 14 Gr. 156; *Collard v. Bennett*, 28 Gr. 556; *Smith v. Doyle*, 4 A. R. 471.

H. Cameron, Q.C., and *Moore* for the defendant M. J. Read. The case made on the argument is not the one made by the pleadings, nor supported by the evidence, and we are not prepared to meet it. The dismissal of the plaintiff's action will not bar his enforcing the right argued for if he has it. There was here no withdrawal of money or property from creditors. This is not such a case as *Leary v. Rose*, 10 Gr. 346.

Bennetto v. Holden, 21 Gr. 222; *Goyer v. Morrison*, 26 Gr. 69, were also referred to.

March 4th, 1884. FERGUSON, J.—The plaintiff being a builder contracted with the defendant John Read to build a house for him at the price of \$850. The plaintiff built the house, and after it was built ascertained, as he says, that it was upon the land of the defendant, Margaret Jane Read, who is the wife of the defendant John Read. It was assumed at the trial (as is stated in the pleadings) that the defendant Margaret Jane Read was at the time an infant under twenty-one years old. The plaintiff was paid only the sum of \$194 or thereabouts of the price of the house. It was not formally proved by the production of the proper documents that the defendant John Read was in insolvency at the time and had not obtained his discharge but the fact was sworn to without objection at the time, though it was afterwards objected that the proof of this was not of the proper character, and, I think, I must assume that the fact was as sworn to by the witnesses. The defendant John Read said that

he intended to pay for the house with moneys that he expected to get from his father but did not get, and some moneys that he made or thought that he would make out of a purchase of some accounts belonging to his own estate. The land of the defendant Margaret Jane Read, on which the house was built, is a small corner of a larger parcel of land. The whole of this large parcel with the house had been sold to one McQuade, who was a witness, and said that the house had increased the value of the property by about \$600. Counsel for the plaintiff at the trial claimed a judgment against Margaret Jane Read for that \$600, and a judgment for the balance against the defendant John Read, relying mainly upon the case of *Jackson v. Bowman*, 14 Gr. 156, and *Collard v. Bennett*, 28 Gr. 556, saying that as the property had been sold to an innocent purchaser he could not have a lien, but that the potential equity was such as to entitle him to a judgment against the defendant Margaret Jane Read for the same sum as that for which he would otherwise have been entitled to a lien upon the property.

No witnesses were called for the defence.

Mr. Cameron, counsel for the defendants, contended that no such case as that contended for by the plaintiff was made upon the pleadings; that he did not come to meet such a case at all, stating that the pleadings were not such that a case of this kind could be sustained upon them, but were such as in an ordinary common law suit where the defendants were sued for money; and he claimed for the female defendant a nonsuit, saying that if such a case as that sought to be made by the plaintiff could be sustained another action might be brought.

The plaintiff also contended that the infancy of the female defendant made no difference in the case, as the question was one of a voluntary settlement by the husband upon the wife, the credit that he got from the plaintiff being in the position of property for the purposes of such a settlement.

I am of the opinion that the statement of claim is suffi-

cient, but barely sufficient to support the kind of case contended for by the plaintiff if he had no other difficulty in his way. The plaintiff's difficulty, one that I think is fatal to the contention that there should be judgment against the female defendant, is that there was no property or fund transferred or settled upon her that would have been liable to seizure by a creditor. The case does not come under the operation of the Statute. The cases relied upon have, I think, no application.

It is not, I think, proved that the female defendant was any party to the making of the contract for the building of the house, and besides she was at that time an infant. The plaintiff is, I think, entitled to judgment against the defendant John Read for \$850, less \$194, paid, = \$656; and interest from January 6th, 1882, = \$85; which amounts in all to \$741.

Judgment for the plaintiff against the defendant John Read for \$741 and his costs of suit.

Judgment for the defendant Margaret Jane Read against the plaintiff without costs.

A. H. F. L.

[CHANCERY DIVISION.]

DORLAND V. JONES.

*a trust for religious body—Devolution thereof—Enquiry into
ual doctrines—Jurisdiction—R. S. O. ch. 216, sec. 10.*

brought by the trustees of the West Lake Monthly Meeting, claiming a declaration that they were entitled to certain trust for the said Monthly Meeting, under a certain deed, the defendants contended that the plaintiffs represented a faction which had broken from the West Lake Monthly Meeting of Friends, and that they claimed to be the true and only West Lake Monthly Meeting of Friends, and that it existed at the time of the deed, and that their Meeting was the only one by it.

Although it was no part of the duty of this or any civil court to determine which of the conflicting doctrines, &c., held by the respective parties was the true, yet, property being concerned, it was necessary to determine who were entitled to it, and for that purpose, but for that purpose only, to inquire into their religious opinions, according to the authority given by Lord Eldon, in *Craigdallie v. Aikman*, 1 Dow 1.

It is not correct to say that in case of a trust such as this, a majority can determine the devolution of the property. To determine the devolution of a trust there must be some certain rule to go by, and if such trust is that in question here, could devolve upon a body, at least in respect of many points of doctrine, from the original cestui que trust, as were the plaintiffs here, it is requisite that the whole should have changed.

The evidence, that the defendants' Monthly Meeting continued the same body in doctrine, order, and discipline, as the West Lake Monthly Meeting was at the time the trust was created, and were entitled to a declaration accordingly.

R. S. O. ch. 216, sec. 10, as to the appointment of trustees of religious bodies does not require the mode of appointment to be determined at one meeting, and the appointment itself made at one meeting. Both things may be done at the one meeting.

The action was brought by John T. Dorland and five trustees of the West Lake Monthly Meeting of Friends, against Gilbert Jones and fourteen others.

The statement of claim alleged that Quakers are a

Christians recognized by the laws of this Pro-

vince were until 1867 united with and sent yearly

to the New York Yearly Meeting of Friends,

by which they were set apart by the parent body and

known as a distinct society, called and known as the

Yearly Meeting of Friends:" that the West Lake

Meeting of Friends is a subordinate society, and

controlled by it, and consists of about 100 members the

number of which reside in the county of Prince

George that by deed dated May 14th, 1821, and registered

February 18th, 1829, Jonathan Bowerman and John Bull, in consideration of \$60, granted, bargained and sold to Jonathan Clark, Daniel Haight, and Gilbert Dorland, Trustees of said West Lake Monthly Meeting of Friends, to secure the title of meeting house lots and burying ground, and to their successors in trust for said Monthly Meeting, all that certain parcel or tract of land, situate, lying, and being in the township of Hallowell in the county of Prince Edward and province of Ontario, containing six acres, (describing them.) “To have and to hold said lands to said Trustees of said Monthly Meeting for the time being, and to their successors in trust as said meeting shall from time to time see cause to appoint for the only use and benefit of said “Monthly Meeting:” that Jonathan Bowerman and John Bull lived more than twelve months after execution of the said deed, but were now long since dead: that the West Lake Monthly Meeting from time to time had as it saw cause, according to the terms of said deed and the usage and practice of the said Society, appointed trustees to the said trust, and on April 30th, 1883, the plaintiffs were duly appointed trustees of the said trust property, pursuant to the Revised Statutes of Ontario, ch. 216, and all of whom were members of the West Lake Monthly Meeting of Friends: that since the purchase of the lands the said Monthly Meeting had erected and maintained a meeting house, sheds and other improvements for the use and convenience of the said Society, and had remained in the sole use and enjoyment of the same for the purposes mentioned in the said trust until the committing of the grievances thereafter set forth: that the defendants, except Walter S. Varney, Walter Leavens, Nathaniel Sweetman, S. M. Outwaters, and Ralph P. Jones, formerly belonged to the said Monthly Meeting, but in or about June, 1881, seceded, and they with others established a distinct Society not recognized by said West Lake Monthly Meeting nor by the Canada Yearly Meeting nor by the New York Yearly Meeting: that the defendants claimed the use and enjoyment of the trust property

and the right to hold meetings therein at other and different days and hours than those appointed and regulated by the said Monthly Meeting, to the great annoyance, discomfort and injury of the plaintiffs: that on Sunday, December 24th, 1882, the defendants forcibly broke open and entered the premises and meeting house and remained there a long time, and on December 27th, 1882, the defendants again with great force and violence broke open the door of the meeting house with an axe, and pryed open the windows with a crow-bar, and severely assaulted and beat the persons appointed by the plaintiffs to take charge of the same, &c.: that the defendants again broke open the meeting house on December 31st, 1882: that the plaintiffs were still in possession: that the defendants contended that the plaintiffs had not been legally appointed trustees under the trust deed, and had assumed to appoint the defendants John Garratt, Levi V. Bowerman, and Amos Bowerman to be trustees under the trust deed, and these persons now claimed to be duly appointed trustees of the property.

The plaintiffs sued on behalf of all the members of the West Lake Monthly Meeting of Friends, who were too numerous to be made parties to this action.

The plaintiffs claimed a declaration that the said trustees held the land in question in trust for the sole and exclusive use of the West Lake Monthly Meeting of Friends, and to have the title thereto confirmed either in their names as such trustees, or in the name of the West Lake Monthly Meeting of Friends or other trustees to be duly appointed pursuant to said trust. And prayed for an injunction to restrain the defendants from interfering with them. And claimed damages and costs of the action.

The defendants by their statement of defence said that the West Lake Monthly Meeting of Friends at the time of the execution and registration of the deed of May 14th, 1821, was a united body of persons who were members of the Society of Friends, and who believed and held the doctrines, and observed and submitted themselves to the usages and practices and ordinances, then and now com-

mon to the Society of Friends: that within the last few years in the various Preparative, Monthly, Quarterly, and Yearly Meetings throughout the world, dissensions and disturbances had arisen in consequence of certain persons, formerly in accord with their fellow members of the Society of Friends, preaching and teaching doctrines and articles of religious belief and usages, ordinances and practices opposed and repugnant to those immemorially believed and observed by the said society, and advising and carrying into practice a discontinuance and neglect of many ancient and venerable usages observances, and ordinances which had been the usual and universal manner of Friends from the inception of their Society: that in the case of the Canada Yearly Meeting of Friends and the Yearly Meetings of Kansas and Iowa, and the Western Yearly Meeting, and the Subordinate Meetings, composing the same respectively, and in the West Lake Monthly Meeting of Friends these dissensions and departures from Friends religious doctrines and church usages had resulted in an actual secession and departure by those persons professing such new religious doctrines and church ordinances, and advocating the discontinuance and neglect of such ancient usages, from the ancient and true Society of Friends as they existed in their various meetings before the said dissensions arose: that the plaintiffs formerly were members of the West Lake Monthly Meeting of Friends, but they and other persons, also, formerly such members, seeking to introduce into the said Monthly Meeting the innovations aforesaid in doctrine and practice, and therein being opposed by the defendants and many other members of the said Monthly Meeting, seceded and separated themselves from and ceased to meet with the said Monthly Meeting, and assumed to constitute themselves a Monthly Meeting, calling themselves by the name of and declaring themselves to be the West Lake Monthly Meeting of Friends; but the defendants say that the plaintiffs and those associating with them as aforesaid are not Friends, and are not the West Lake Monthly Meeting

of Friends, but the defendants and those members of the West Lake Monthly Meeting of Friends adhering to the ancient doctrines and usages of the Society of Friends as believed and observed prior to such separation are the true and only West Lake Monthly Meeting of Friends: that the plaintiffs assumed to be in union with various other and foreign meetings of Friends, but the defendants shewed and said that the meetings with which the plaintiffs claimed to be in union were meetings in dissension and discord among themselves, and in which, although an actual bodily secession and separation had not taken place, the party variously denominated: "New Lights," "Fast Quakers," or "Progressives," (of whom were the plaintiffs and their followers,) had acquired ascendancy, and the defendants and their adherents did not maintain union with such disrupted meetings, but were in union with meetings which like themselves continued to maintain the ancient and long established doctrines of faith and church observances, ordinances and usages of the Society of Friends: that the grantees named in the deed of May 14th, 1821, were not, nor were the plaintiffs a corporate body, nor were the plaintiffs in regular succession to such grantees in the office of trustees as alleged in the said statement of claim, nor were they or any of them appointed to that office by the West Lake Monthly Meeting of Friends, nor were they or any of them, or any of the persons whom they represent, Friends, nor were they or any of them recognized as Friends, either individually or their party as a meeting of Friends, either by the West Lake Monthly Meeting of Friends or the Canada Yearly Meeting of Friends, or by any meeting adhering to the original and true faith and usages of and who are in fact of the Society of Friends: that the meeting house and other improvements upon the lands in question were erected and maintained by the West Lake Monthly Meeting of Friends as it existed prior to the secession of the plaintiffs and their following therefrom, and the defendants and their adherents were in direct succession to and truly represented, and were the same body as the West Lake

Monthly Meeting of Friends is a trustee at the time of the execution and delivery of the said deed. The body of persons maintaining the business and managed business and usage of the church called the Society of Friends consisted of that church and the defendants and their adherents were those persons and were therefore entitled during the said term to the use and benefit of the lands and the meeting house and to the possession of the plaintiffs and those in accord with them who have departed from Friends faith and observances.

The defendants denied that they ever seceded from the West Lake Monthly Meeting of Friends and that they had ever established a distinct society not recognized by the West Lake Monthly Meeting of Friends or by the Canada Yearly Meeting of Friends, or by the New York Yearly Meeting of Friends: but the defendants said and charged that the plaintiffs had so seceded and established a distinct society not so recognized as the defendants said it was not competent for a body of church members to abandon the faith and usages of the church, and still assume to be the church, and by assuming the distinctive name of the church to be entitled to its property.

In answer to the charges as to breaking open the building, &c., the defendants said that the plaintiffs on these several occasions by themselves and their agents wrongfully locked, fastened up, and barricaded the said meeting house and premises, and refused to admit the defendants thereto, and attempted by force and arms to hold exclusive possession thereof, and to exclude the defendants therefrom, and grievously assaulted and beat the defendants, and did their best endeavors to prevent and disturb the defendants in their right of public worship in the meeting-house, and the defendants entered the meeting-house and held their meeting, using no more force than was necessary.

The defendants by counter claim asked a declaration that the trustees appointed to the office under the deed next before the assumed appointment of the plaintiffs held the lands in question in trust for the sole and exclusive use

of the West Lake Monthly Meeting of Friends as represented by the defendants, and to have the title thereto confirmed, &c.; and an injunction to restrain the plaintiffs from disturbing the defendants, &c.; and claimed damages, and costs of suit.

The allegation in the statement of claim of the appointment of trustees on April 30th, 1883, was introduced by amendment, as also the allegation of the appointment of trustees by the defendants, and that the plaintiffs sued on behalf of themselves and others, &c.

Thereupon the defendants put in a further statement of defence, denying that the plaintiffs were trustees as alleged, and denying the title of the plaintiffs to the premises in question, and their right to the possession or control of them and that the plaintiffs represented the West Lake Monthly meeting of Friends—and that the plaintiffs and those taking part with them were the West Lake Monthly Meeting of Friends. They said that prior to the year 1867, the West Lake Monthly Meeting of Friends was a subordinate Meeting of the New York Yearly Meeting of Friends, which, with its subordinate meetings, was constituted under and governed in all respects by The New York discipline of 1859: that in or about the year 1867, the Friends in Canada, duly, and in accordance with the provisions of the said discipline, and with the concurrence of The New York Yearly Meeting of Friends, became the Canada Yearly Meeting of Friends under the New York discipline of 1859, which was adopted by the Canada Yearly Meeting immediately upon its constitution, and was, and continued to be, and is now the constitution and laws of the Society of Friends in Canada, and the West Lake Monthly Meeting of Friends upon the constitution of the Canada Yearly Meeting became, and still is a subordinate meeting thereof, and had always adhered and still adheres to the New York discipline of 1859, of which monthly meeting the defendants were members; but the plaintiffs and their adherents refused to adhere to the discipline of 1859, and in or about the year 1880 they asserted and endeavoured to impose on the Society of Friends in Canada, and upon the West Lake

Monthly Meeting of Friends, a certain other discipline, in many respects differing from and inconsistent with the discipline of 1859, and they pretended and alleged, and still pretend and allege, that the same was adopted by the Society of Friends at the Canada Yearly Meeting of 1880, which the defendants said was untrue, and they acting contrary to the discipline of 1859, had held separate meetings from the defendants and the adherents to the discipline of 1859, and had from time to time introduced practices and doctrines at such meetings, at variance with the said old discipline and with the well known and established belief and practice of the Society of Friends, and they continued to do so, and the plaintiffs were separatists and not entitled to the property of the West Lake Monthly Meeting or to the possession or control of the same in any way : that the defendants and those taking part with them were the West Lake Monthly Meeting of Friends, and entitled to the possession and control of the premises, and entitled to elect trustees of the same when necessary.

The plaintiffs replied joining issue upon the defendants' statement of defence, and to the defendants' counter claim, said : that the Society of Orthodox Friends is one body of Christians, composed of Yearly Meetings, with their subordinate branches in England, Ireland, the United States, and Canada: that the bond of union was officially maintained by annual correspondence between them, and by issuing and receiving the credentials of travelling ministers, by granting and receiving certificates of membership in case of removal, to which all were entitled throughout the Society, and by joint participation in religious and benevolent enterprises: that each yearly meeting was independent in the transaction of business, and in making and exercising its disciplinary regulations: that at the time of the execution of the deed of May 14th, 1821, the West Lake Monthly Meeting of Friends was a branch Society of Friends, subordinate to and under the discipline of the New York Yearly Meeting of Friends, and so continued until the Canada Yearly Meeting was

established: that in 1867 the New York Yearly Meeting set off and established the Canada Yearly Meeting, of which the West Lake Monthly Meeting was a branch, and to which it was subordinate: that the Canada Yearly Meeting since its establishment had been, and still was, in official union with the said New York Yearly Meeting, and also with the Yearly Meetings of London, Dublin, New England, Baltimore, Ohio, North Carolina, Indiana, Western Iowa, and Kansas, which were all the Yearly Meetings of Orthodox Friends in England, Ireland, United States, and Canada: that in 1867 the Canada Yearly Meeting adopted the discipline of the New York Yearly Meeting; in 1877 the discipline of the New York Yearly Meeting was revised, and in 1880 the Canada Yearly Meeting adopted the same as so revised, and the same was approved and adopted by the West Lake Monthly Meeting, and by the other subordinate branches of the Canada Yearly Meeting, and was the recognized discipline of the Orthodox Friends in Canada: that the defendants, except as stated in the claim, were members of the West Lake Monthly Meeting of Friends and continued in unity therewith until about the month of February, 1881, when they and other persons, also formerly members, seceded and separated themselves from, and ceased to meet with the said Monthly Meeting and assumed to constitute themselves a Monthly Meeting; but the plaintiffs alleged that the plaintiffs and those whom they represented were the true and only West Lake Monthly Meeting of Friends, and were recognized by the Canada Yearly Meeting and by the various Yearly Meetings throughout England, Ireland and America, but that the defendants were not in union with nor were they recognized by any of said Yearly Meetings, nor were they of the society of Friends: that the plaintiffs were appointed trustees to said trust on October 21st, 1880, by the West Lake Monthly Meeting of Friends, before the defendants seceded, and were in regular succession to such grantees named in the deed of May 14th, 1821, and held the same in trust for the

West Lake Monthly Meeting of Friends, and claimed the benefit of the various statutes of this Province relating to religious societies : that the plaintiffs as such trustees, and on behalf of the said Monthly Meeting, claimed the said premises by length of possession in themselves and those through whom they claimed, and in the said Monthly Meeting : that at the time the defendants seceded there was a large debt against the said premises which the plaintiffs and those they represent had since paid off : and that on December 14th, 1835, Jonathan Bowerman, one of the grantors named in the trust deed of May 21st, 1821, executed a further conveyance of the said premises or a portion thereof by way of compensation to Jonathan Clark and Gilbert Dorland the two trustees then surviving under said trust deed.

At the time the defendants seceded there was a large debt against the said premises, which the plaintiffs and those they represent have since paid off.

On the 11th of December, 1835, Jonathan Bowerman, one of the grantors named in the trust deed of May 21st, 1821, executed a further conveyance of the said premises, or a portion thereof, by way of confirmation, to Jonathan Clark and Gilbert Dorland, the two trustees then surviving under said trust deed.

At the hearing the defendants asked leave to amend their defence by setting up that the new constitution was not really adopted at the Canada Yearly Meeting of 1880, so as to bind the minority : that to change the constitution it required unanimity. The learned Judge granted leave accordingly, and the statement of defence must therefore read as if that were included in it.

An order was obtained by the plaintiffs requiring the defendants to specify the particulars of the doctrines and articles of religious belief, usages, ordinances, and practices alleged to have been preached or taught by the plaintiffs, which are repugnant to those immemorially believed and observed by the Society of Friends.

The defendants specified the following :—

1. That Christ finished the work of man's salvation on

the Cross, on Calvary ; and, therefore, it is only necessary that a man believe that fact to be saved.

2. That faith is a faculty of the mind, to be exercised at will in accepting salvation on the ground of Christ's finished work.

3. That such an acceptance constitutes a believer in Christ and a Christian.

4. That such believers have the continuous indwelling of the Holy Spirit in such a degree as to qualify them for vocal religious service in the Church at all times.

5. That the Holy Spirit does not work in the heart of the sinner until after conversion or the acceptance of Christ.

6. That there is no sorrow in repentance, it being simply a turning and going another way.

7. That the new birth is a fact and not a process.

8. That the Holy Spirit does not work in the heart of the sinner. (See No. 5 above.)

9. That Christ's second appearance, without sin unto salvation will be a personal appearance.

10. That the Scriptures, being the words of God, are equal to and one with the Spirit of God.

11. That all those who believe (in the manner above alluded to) have the Spirit of God as their abiding guest, and consequently their salvation is accomplished, and they enjoy uninterrupted peace.

12. That every member of the church after conversion is authorized and competent to engage in vocal religious service without immediate inspiration or the moving of the Spirit.

13. That in Friends religious meetings it is not necessary to wait in silence, or wait at all, for the inspiration of the Holy Spirit, but that all are competent to engage in vocal service acceptable to God at once.

14. That conversion is instantaneous, and such instantaneous fact included justification.

15. That the belief of Friends that the direct and immediate inspiration of the Holy Spirit should be the director of all our actions, and that if we wait for the same we will receive it, is not a necessity.

16. That regeneration or sanctification is a state only attained after conversion and acceptance of the sinner by God.

17. And many other false and pernicious doctrines as set forth in the books, &c., produced by the defendants, under the order to produce.

18. The practices introduced by the plaintiffs are :

(1.) Reading the Scriptures in religious meetings.

(2.) Singing of hymns in such meetings.

(3.) Holding of revival meetings, and at such meetings calling on those present to speak, to relate their experiences, to pray, to sing, to repeat prayers from dictation, to come forward to a mourners' bench, and generally conducting such meetings after a manner inconsistent with the order of Friends Meetings.

(4.) Acceptance by ministers of pecuniary remuneration for the exercise of their office in religious services.

(5.) The holding of meetings for business in joint session, and doing away with the dividing partition.

(6.) Setting up pulpits, and using reading desks, and musical instruments in meeting houses.

(7.) The appointment of Elders for a limited time, instead of during life or good behaviour.

(8.) The appointment and maintenance of a Pastoral Committee with power contrary to the discipline of 1859.

(9.) Receiving the ministration of ministers who preached unsound doctrine, and according them returning minutes, and joining in and countenancing their irregular practices.

(10.) The use of irreverent, unbecoming and improper language in the course of assumed ministerial vocal service in meetings.

(11.) Practising the relation of personal experience and exhortation in meeting at will, instead of waiting for and speaking only upon the inspiration of the Spirit.

19. The particulars of the ancient and venerable uses observances and ordinances neglected and discontinued by the plaintiffs are—

(1.) The disuse of the dividing partition between the sexes in meetings for discipline. (2.) The discontinuance of silent

waiting for the inspiration of the Spirit in meeting, and other practices involved in the above.

20. The particulars of the differences between the discipline used by the plaintiffs and the New York discipline of 1859, appear by reference to the printed copies of their disciplines respectively (a.)

The action was tried on October 2nd, 3rd, 4th, and 6th, 1883, before Proudfoot, J., at Belleville.

J. Bethune, Q. C., and *Clute* for the plaintiffs, referred to *Attorney General v. Etheridge*, 32 L. J. N. S., Ch. 161; *Attorney General v. Gould*, 30 L. J. N. S., Ch. 77; *S. C.*, 28 Bea. 485; *Attorney General v. Pearson* 3 Mer. 353; *Doe dem. Trustees of the Methodist Episcopal Church v. Bell*, 5 O. S. 344; *Doe Methodist Episcopal Trustees v. Brass*, 6 O. S. 437; *Humphreys v. Hunter*, 20 C. P. 456; *Trustees of the Ainleyville, &c., Church v. Grewer*, 23 C. P. 533; *Earl v. Wood*, 8 Cush. (Mass.) 430; 9 Geo. IV., ch. 2; 3 Vic. ch. 73; 8 Vic. ch. 15; C. S. U. C. ch. 69; 36 Vic. ch. 135, sec 14, O; R. S. O. ch. 216, sec. 10.

MacLennan, Q. C., *F. Arnoldi*, and *Alcorn*, for the defendants. referred to *Attorney General v. Jeffery*, 10 Gr. 273.

January 9th, 1884. PROUDFOOT, J.—[After stating the pleadings and proceedings as above,]

This action has arisen from the unhappy differences of opinion that have occurred in the respectable body of Christians called Friends, or, more commonly, Quakers.

It is no part of the duty of this or any civil Court to determine which of the conflicting views are true. But where property is concerned it becomes necessary to ascertain who are the parties entitled to it, and for that purpose, but for that purpose only, to inquire into their religious opinions, to see who are the beneficiaries.

The rule governing our Courts on the subject was laid down by Lord Eldon in a very celebrated case, *Craigdallie v. Aikman*, 1 Dow 1, and it is this, that in internal controversies respecting rights to church property, it is the duty of a Court to decide in favour of those, whether a minority

(a.) This statement is from the judgment of the learned Judge.

or a majority of the congregation, who are adhering to the doctrine professed by the congregation, and the form of worship in practice, and also to the form of church government in operation in the church, with which the congregation was connected at the time the trust was declared.

The Hon. Justice Strong, of the United States Supreme Court, remarks upon this, in his Lectures upon the relations of Civil Law to Church polity, discipline, and property (*b*) p. 52: "It may perhaps be doubted whether all this is true, in its fullest extent in this country. (the United States). But it is true that when a settlement of property has been made for the use of a Church which holds specified doctrines those members only have an interest in the property that hold those doctrines, if it can be gathered from the settlement that the maintenance of those doctrines was intended; and a civil Court will do whatever is necessary, in case of a division, to ascertain which party holds them. * * Property may be settled for the use of a Trinitarian Church, or of an Universalist Church, or of a church holding and teaching the doctrine of total depravity, or of one repudiating the doctrine of election, or of one that accepts the Heidelberg Catechism, or of one that believes only Sternhold and Hopkins's version of the Psalms ought to be used in public worship. * * They are all lawful, and civil Courts will enforce them as made. * * If a Trinitarian Church upon which such a settlement has been made—a settlement manifestly having in view Trinitarian doctrines—departs from its faith, if a majority of its members become Unitarians, they forfeit all right to the property, and civil Courts will adjudge the whole to the minority (however small) who remain Trinitarians. * * There are some cases however of more difficulty. They are those in which the trust has not been so accurately defined. * * The grant may have no expressed reference

(*b*) Two lectures upon the relations of Civil Law to Church polity, discipline, and property, by Hon. William Strong, LL.D., Justice of the Supreme Court, U. S., New York; Dodd & Mead, publishers, 1875.

to any single doctrine. Suppose it to be made to a Church adhering to the creed of the German Reformed Church, or still more loosely, for the erection and support of a German Reformed Church, without more. Courts of law hold such a grant as creating a trust. But what trust? I answer, one that is twofold in its nature. First, it is for the use of a Church that is German Reformed in its form of government, its order, and its discipline. Secondly, it is for a Church that holds the creed or articles of faith accepted by the German Reformed Church generally when the grant was made. Both form and doctrine are essential to the existence of a Church. Hence, in enforcing such a trust, and protecting it, not only is the form of the beneficiary to be considered, but it is indispensable to inquire what were the doctrines of the Church when the trust was stamped upon the property, and what are the accepted doctrines of those who claim to be beneficiaries. If there has been any material departure from the acknowledged standards of faith existing when the trust was founded, those who have thus departed are no longer owners, and they will not be recognized as such by the Courts of law." The learned Judge then notices an opinion of a well known judge (I presume, Lowrie, C. J., in *McGinnis v Watson*, 5 Wright, Penn., 9), that "This would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life; for it would forbid both growth and decay; not *prevent*, for that is impossible. The guarantee of freedom to religion forbids us to understand the rule in that way," at p. 16. From this opinion Mr. Justice Strong earnestly dissents. It was but the opinion of a single Judge, not necessary to the case decided, and it is in conflict with all the well considered decisions in this country, and in England. He quotes against it the opinion of another Judge (Sharswood, J., in *Schnorr's appeal*, 67 Penn. 138, 146) that "Civil Courts which have the supervision and control of all corporations, and unincorporated societies or associations, in matters of property must be guided by surer and clearer principles than those

to be derived from the nature of intellectual and spiritual life. The guarantee of religious freedom has nothing to do with the property. It does not guarantee freedom to steal Churches. It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund; and building another house of worship; but it does not confer upon them the right of taking property consecrated to other uses by those who may be sleeping in their graves." (c)

I have quoted thus largely from the opinions of Judges in the United States, because the plaintiffs referred me to some cases in the American Courts that seemed to lay down a different rule, and rather encouraged the notion that a majority might determine the devolution of the property. But when these cases are examined they decide nothing of the sort, and though occupied with disputes that had arisen among this same body of Christians, the Quakers, have really no bearing on the matters involved in this present case. In *Earle v. Wood*, reported in 8 Cush. (Mass.) 430, but of which a separate report has been left with me prepared under the advice of the complainants' Counsel,—Shaw, C. J., says, at p. 457: "At one stage of the controversy, it seemed to be supposed that it would depend mainly on soundness of faith, an adherence to or dissent from speculative theological opinion and belief, and much evidence was taken upon that subject, and it was alluded to in the learned arguments addressed to us." Then, after suggesting that it would seem inconsistent with the nature and principles of the Quaker system to be bound down as a body, as a Christian denomination, to a precise and unbending rule in matters of speculative opinion, he proceeds to say that the Court was saved the necessity of going further into this supposed test from creeds and opinions, because at the Yearly Meeting, whose orthodoxy was

(c) The above are the words of this citation as actually found in the report in 67 Penn. Mr. Justice Strong slightly alters the language in question, though he refers to the report as his authority.

impugned, a narrative and declaration was put forth, in which they avow and state their belief, in a manner admitted to be in conformity with the ancient testimonies of Friends, and satisfactory to those who affix the imputation of heresy to that Yearly Meeting, and the whole question turned upon whether the election of overseers of a Monthly Meeting was in favour of the plaintiffs or the defendants.

The plaintiffs also referred to the case of *Harrison v. Hoyle*, in the Supreme Court of Ohio, of which a separate report has also been left with me, but I do not see from that report how either party can be said to have succeeded. It does not appear how many Judges heard the case in the Supreme Court; the opinions of four are given, and they were equally divided. There does not seem to have been any decision in the District Court, where the case first came on, but at the suggestion of the Court and on motion of both parties it determined to reserve the case for the consideration and decision of the Supreme Court. However it was treated as a decision in favour of the party with whom the plaintiffs are in union. But in that also the whole matter turned upon a question as to the regularity of the procedure in the election of a clerk, and no question of faith or doctrine was involved in it. There was no question of orthodoxy, but only one of discipline.

The English rule as laid down by Lord Eldon has always been acted upon in this province. As stated by the present Chief Justice of Appeal (c), when Chancellor, in *Deeks v. Davidson*, 26 Gr. 488, "in a question of title to property, the question of identity was *the* material question," (p. 491), and he shows this to have been acknowledged in *Doe v. Bell*, 5 O. S. 344, and *Doe v. Brass*, 6 O. S. 437, and acted upon also in *The Attorney General v. Jeffrey*, 10 Gr. 273, and in *Attorney General v. Christie*, 13 Gr. 495.

I do not think there is any ground for assuming that the purchase of this land was made in contemplation of organic changes in the doctrines, the order, and dis-

(c) Spragge, C.

cipline of the body, under the guiding influence of the Holy Spirit: that progress in theology must have been in the minds of the purchasers, and they must have considered as possible the evolution of new doctrines from a deeper, more earnest and continuous study of the Scriptures. The Quakers do acknowledge the presiding influence of the Holy Spirit, and deem it a primary power, while the Scriptures are secondary to it, in this sense, that they are only the result of its influence on the holy men who were inspired by it. But they ascribe such value to the Scriptures that any thing at variance with them cannot be the true work of the Holy Spirit. And as to order and discipline the purchasers must have looked to the continuance of the existing order of things. This is a presumption that it lies on the impugners of it to rebut.

The circumstances of the present case tend strongly to substantiate this view. The property was purchased in 1821, in 1828 the Hicksite schism occurred, but the Westlake Monthly Meeting remained orthodox and adhered to the doctrines of the founders. If progress in theology were recognized as a Quaker belief it would be difficult to determine which were the schismatics, those who professed the new doctrines evolved from the Scriptures by men professing to be guided by the Spirit, or those who remained in the old paths. But it is a mistake to suppose that Quakers are without a creed. They have indeed no written creed embracing all the matters of their belief. But they do believe in the Bible, and the orthodox adhere to it, and to the doctrines which their founders deduced from it. The Quaker belief, as testified by some of the witnesses, is Arminian; it is quite *possible* to extract Calvinistic doctrines from the Bible; is it at all probable that the Arminians, who purchased the property, contemplated it as being for the benefit of a Calvinistic body to arise in the future? This is not probable, and it must be the subject of proof by those who assert it.

The same remark applies to matters of government, order, and discipline. We know what these were from 1821 to

1880. The property was enjoyed under these, and if it was meant that these might be changed so that the original body could scarcely be recognized, it must be the subject of evidence. What evidence there is tends the other way. The deed of 1835 requires the members of the West Lake Monthly Meeting to be in unity with the London Yearly Meeting as *then* constituted, not with that meeting as it might be at any time in the future. The West Lake Meeting was then in unity with the London Meeting, and it is not alleged even that the defendants' West Lake Meeting has in any wise changed its doctrines, government, order, and discipline. If its members are not in unity with the London Meeting it must be because the latter has changed. The plaintiffs allege that they are in unity with the London Meeting; it is shewn that they have altered the order and discipline of the body, that they use practices different from the defendants, that they are Progressives, the very name implying change, and if the London Meeting is in unity with them, it must have changed.

But to determine the devolution of property, there must be some certain rule to go by, and assuming it possible that it might become the property of a body at variance in so many particulars from the original, associated in the profession of new principles evolved by the inner light, it must be requisite that the whole body should change. So long as any one remained attached to the original faith and order, that one is the beneficiary.

I do not doubt that the purchase might have been made for the benefit of the majority of the West Lake Monthly Meeting whatever its principles might be, but it is incumbent on the plaintiffs to establish that, and they have not done so.

The deed of May 14th, 1821, made by Bowerman and Bull of the one part, and Clark, Haight, and Dorland, trustees of the West Lake Monthly Meeting of Friends, appointed by said Monthly Meeting to secure the titles of meeting house lots and burying grounds, of the other part, in consideration of £15, granted the six acres to the

trustees and to their successors in trust for the said Monthly Meeting, to have and to hold the land unto the aforesaid trustees of the said Monthly Meeting for the time being, and to their successors in trust as said Meeting shall from time to time see cause to appoint, for the only use and benefit of the said Meeting.

Assuming this to have been a sale for value, as it seems to have been, and thus protected under the 2nd section of the Mortmain Act, the deed only passed an estate for the life of the trustees, as it was not till 1828 that the 9 Geo. IV. ch. 2 enabled trustees to take in a *quasi* corporate capacity.

That statute, while enabling trustees and their successors to hold land for a religious society, limited the quantity to 5 acres.

The deed of December 14th, 1835, made by Bowerman alone to Clark & Dorland, trustees of the West Lake Monthly Meeting, in consideration of £7 10s., granted to Clark & Dorland, and to their successors, in trust, for said meeting so long as the members constituting it shall remain and be from time to time continued in religious unity with the yearly meeting of friends called Quakers, as then established in London, old England, and no longer, three acres of the six previously conveyed by the deed of May, 1821, to have and to hold unto the aforesaid trustees of the said Monthly Meeting, and to their successors, in trust for the time being as said meeting shall from time to time see cause to appoint for the only use and benefit of the said Monthly Meeting. It then recited the deed of May, 1821, granting six acres, and that in consequence of an Act of the statutes of this Province of the 25th of March, 1828, (9 Geo. IV. c. 2) prohibiting any religious society from holding more than five acres, the right of inheritance in the six acres may not be transferable to any trustees of the said West Lake Monthly Meeting in perpetuity, but may cease to exist in right of inheritance at the time of the decease of the last surviving trustee as mentioned in the original deed, and that Bowerman, in order to fulfil and

realize his original contract with the Monthly Meeting in a state of perpetuity, did thereby for him, his heirs, executors, administrators, and assigns, establish and confirm unto the said trustees the full right of inheritance for ever as aforesaid in a state of legal reversion, that is to say, that this indenture shall be valid in law and remain in full force and virtue by retaining the full and lawful possession and occupation of said demised premises to the Monthly Meeting, and to commence in full force perpetuity and right of inheritance at the precise juncture and instant of time in which the last surviving trustee shall die, to wit : the said Haight, Dorland, and Clark.

In the deed of May, 1821, Bowerman and Bull jointly grant the six acres, but I understand that they owned adjoining lots and each sold three acres. The effect of this latter deed would seem to be to confirm Bowerman's previous grant for the life of the trustees, as to his three acres, and to grant a remainder in fee to the trustees for the time being, and their successors. It imposes a qualification, which would appear to be valid both as to the life estate and the fee, that the members constituting the Monthly Meeting shall continue in unity with the Yearly Meeting of Friends as then established in London, old England. I think it valid as to the life estate, only because the Monthly Meeting seems to have accepted it in that way, otherwise I do not think it was competent for the grantor while confirming a prior grant to add a new qualification to it.

But this portion of three acres is of the less importance as the buildings are not on it.

The whole six acres continued to be occupied by the West Lake Monthly Meeting, or rather by the trustees from time to time appointed by them, for a period of 59 years, till 1880. The restriction as to the six acres was removed by the 3 Vic. c. 73, (1841.)

It is quite true that the Monthly Meeting is not incorporated and could not take by prescription, unless, perhaps, as against the Crown : *Browne on Limit.* p. 143. But they

were authorized to appoint trustees to hold property for them, and those trustees have remained in possession from 1841, when the restriction as to quantity was removed till 1880 (39 years), of the whole six acres. The possession of a trustee is the possession of the beneficiary: *Browne on Limit.* p. 114.

It seems to me, therefore, that the West Lake Monthly Meeting holds the three acres purchased from Bowerman, under the deed of December, 1835, subject to the qualification of the members being in unity with the Yearly Meeting in London as then established, and that it is entitled to the three acres purchased from Bull by possession, without any such qualification.

The effect of this qualification will depend upon the result of the next subject of inquiry, viz: whether the plaintiffs or defendants are the objects of the trust, for if it should be found that the plaintiffs are not objects of the trust they have no right to attack the title of the defendants.

I need not pursue this question of title further, for both parties claim that the West Lake Monthly Meeting is entitled to the property, and the question is, whether the plaintiffs or defendants represent the real West Lake Monthly Meeting.

The polity of the Quaker Church recognizes a series of meetings in regular gradation: the Preparative Meeting, subordinate to the Monthly; the Monthly to the Quarterly, and the Quarterly to the Yearly. This Yearly Meeting is a supreme tribunal, subordinate to none, and as stated by the plaintiffs in their reply, "is independent in the transaction of its business, and in making and executing the disciplinary regulations."

In regard to the claim of the plaintiffs in their reply, "that the Society of Friends is one body of Friends, with Yearly Meetings in England, Ireland, the United States, and Canada, and the bond of union is maintained by correspondence," I quote the language of Shaw, C. J., in *Earle v. Wood*, 8 Cush. (Mass.) 430, to which the plaintiffs referred

me. He says, at p. 456: "The different Yearly Meetings in America and England keep up a friendly and fraternal communication with each other by means of epistles, visits, and liberating certificates, or general letters of recommendation from one to another; but there is no subordination acknowledged of one to another, or to all the others. From this view of the constitution, organization, and acknowledged usages of the Quaker body, it appears that the Yearly Meeting has a final and controlling jurisdiction in all matters of faith and religious duty, of administration and discipline, as well as of manners and conduct of all Quakers within its limits. It is final and conclusive, because there is no superior body which can call its decisions in question. It is conclusive in the sense in which the judgments of the highest Courts are conclusive, not because they are necessarily wiser or better than those of other Courts, but because it is the tribunal of last resort, and the constitution and laws have created no tribunal to reexamine its decisions. * * Each Yearly Meeting is independent of all others, and different Yearly Meetings have no other connection than that which results from Christian fellowship and courtesy."

This is also quoted and approved by Welch, C. J., in his very able judgment in *Harrison v. Hoyle*, and he states his own opinion, which seems to me to be borne out by the evidence in this case, that "nothing, therefore, could be much clearer to my mind than that these yearly meetings are independent organizations, and that the decisions of each, regarding its own matters of discipline and government, are subject to no review by the other yearly meetings. * * * As to the argument drawn from the evidence that new yearly meetings are *set up* by the old ones, I have merely to say it is a play upon this phrase *set up*. There is no proof that one was ever *set down*. * * They are set up in the sense that a father sets up his sons in business, or his daughters in marriage. When set up, however, they became their own men and women. When the hive becomes too full the bees swarm, and the swarm becomes an independent hive."

In November, 1803, a preparative meeting was established at West Lake, subsequently a Monthly Meeting was established there, and in 1848 a Quarterly Meeting, and in 1867 this Quarterly Meeting was allowed to hold its meetings three times a year, making it a four months meeting. These and all other meetings of a like kind in Canada were, until 1867, subordinate to the New York Yearly Meeting, and under its discipline. The discipline in force at the time of the making of the deeds of 1821 and 1835 was that of 1810, and the book containing it seems to be purely a book of discipline, and I cannot from that determine what the belief of Quakers was upon the matter of faith brought in question in this case. But the difficulty is removed to some extent by referring to the revision of that discipline in 1859, which was assented to by all the subordinate meetings in Canada, and which is preceded by a brief view of the doctrines of Christianity which contains the opinion of the Quaker body upon some, though not all, matters of faith. This seems to have been assented to not as stating anything new but as summarizing opinions well known and long believed by the body, and it was accepted and acted upon by both parties to this litigation from 1859 till 1880. I am justified then in assuming that it correctly expresses the belief of Quakers in 1821 and 1835, and thence down to 1880, upon the matters contained in it. As to the belief of the Quakers on subjects outside of that discipline I must be guided by the evidence and the works of the founders, to which reference was made.

The contention of the plaintiffs in regard to several of the practices and things objected to them was, that they were only reviving doctrines and practices the seeds and origins of which they had discovered in the writings of the founders of the Society. But it appeared that these doctrines and practices had not been believed and practiced for about 150 years, and were not the common belief and practice of Quakers at the time this property was acquired. What I have to ascertain is, what were the

doctrines believed, and the form and mode of discipline and Church government at this latter time, and I am not at liberty to look at the opinions of the founders upon these topics that no longer found a place in the actual belief and practice of the Quakers.

It is to be observed that there is no imputation of unsoundness in the faith against the defendants, and the only ground upon which the plaintiffs allege that the defendants are not Friends, seems to be that they have opposed the plaintiffs and are not in union with, nor recognized by any of the Yearly Meetings that recognize the plaintiffs.

The Friends in Canada applied in 1863, to the New York Yearly Meeting for the establishment of a Yearly Meeting in Canada comprising the Quarterly Meetings of Pelham, Yonge Street, and West Lake. The application was referred to a joint committee, and such steps were afterwards taken, that at the New York Yearly Meeting in 1866 it was concluded to authorize those Quarterly Meetings to meet at 11 a.m., on the last sixth day in sixth month, 1867, at Pickering, Canada West, and establish the said meeting, the meeting of ministers and elders to be held the preceding day at 11 o'clock. Those Quarterly Meetings were instructed to appoint representatives to attend and assist in the establishment of the Yearly Meeting, and certain persons were named and appointed to attend at the opening of the Yearly Meeting, and instructed to render such assistance in the establishment of the Yearly Meeting as they might be enabled to do.

The minute of the New York Yearly Meeting concludes as follows, strongly fortifying the view of the entire independence of the Yearly Meeting about to be established,—to use Chief Justice Welch's language it was a swarming of the hive, about to found an independent hive: "In thus parting with our dear friends with whom we have been accustomed many years to meet in council in the cause of the Church, we desire thankfully to acknowledge that we have been enabled so long to labour together in love, and

we earnestly desire that He, who is God over all blessed for ever, will be with them in this responsible engagement, to guide them and comfort them with His holy presence."

The Canada Yearly Meeting was accordingly constituted upon the 28th of June 1867, and all parties worked harmoniously till 1880.

The New York Yearly Meeting had in the meantime (1877) revised their discipline, and this appears to have attracted the attention of a few of the Friends in Canada. I think the evidence shows that but few of the Canadian Friends had ever seen it prior to the Yearly Meeting of 1880. In 1879 the Pelham Quarterly Meeting had requested the Yearly Meeting to have the book of discipline revised, and the Yearly Meeting appointed a committee who were instructed to confer together "and advise in what way we shall engage in so weighty a work as a revision of discipline; whether by the appointment of a joint committee on revision, or by referring the service to our representative meeting for its action, and report of progress next year." The committee united in recommending that it be done by the representative meeting, and the revision of discipline was referred to the representative meeting. The report of the representative meeting is not printed so far as I have been able to find, but Mr. Barker, who was a member of that meeting, says the subject was before the representative meeting on the 25th and 26th of June, 1880, and that it reported advising the adoption of the New York revised discipline. And the report was received, and the New York discipline read, occupying a part of two days, and it was adopted, and appointed to come into force on the 1st of January, 1881. The adoption was objected to by many on the ground of haste, and time was wanted for consideration; but without considering further at present the mode in which it was carried, and the numerous objections that have been made as to its legality, it is to be remarked that the plaintiffs having adopted another discipline than that previously in force and on which all were united, it is incumbent on them to show that this

discipline does not vary in any essential particular from the former. This new discipline comprises also a brief view of the doctrines of Christianity as set forth in Holy Scripture and held by the Society of Friends.

According to the law as laid down by Lord Eldon the identity of the religious body is to be ascertained by identity not only in doctrine, but in the form of worship, and of church government. This form of church government will include also matters of discipline, or, as expressed by Mr. Justice Strong, the form of government, its order, and its discipline. The plaintiffs are what are known as *Progressives*. Some of the witnesses for the plaintiffs stated they were Progressives. Mr. Uptegraff, a minister belonging to the Ohio Yearly Meeting, avowed himself a Progressive, and Mr. Woodward, a minister of the Canada Yearly Meeting, and Mr. Barker, also a minister of that Yearly Meeting, and superintendent of the college of the body at Pickering, agreed in the statement of the doctrines held by the body. I may return hereafter to some of the theological opinions expressed by them, but at present I refer to their position as Progressives as explaining some of the differences between the two books of discipline.

In the discipline of 1859 there is a section headed "Days and Times." In this it is said that the names in ordinary use of the days of the week, and most of the months, being of idolatrous origin, contrary to the practice of good and holy men in former ages, and repugnant to the Christian testimony borne by our faithful Friends and predecessors in the Truth, for the sake of which they patiently endured many revilings: let not the reproach of singularity turn any aside from the simplicity of the Gospel, in denominating the months and days according to the numerical and Scriptural way of expression. It then speaks of fasts and holy-days, and that our members cannot consistently join in the observance of them; nor conform to the custom of illuminating houses, nor do any work of joy for victory obtained in war, or for any other occasion of public re-

joicing. It states, also, that they do not consider one day more holy than another, but agree with other Christians in setting apart one day in the week for public worship, and rest from temporal business.

This is altogether omitted from the revised discipline. It cannot be said that these are matters of no importance. They exercise an important influence in keeping the Friends separate from other religious societies, and from the world. By omitting them, it leaves it optional with the members to conform in these particulars to the customs of the world, and thus tends to destroy the distinctive character of the body. These are certainly as important as the question arising in other bodies, whether praise should be vocal or instrumental, and whether Sternhold and Hopkins's versions of the Psalms should alone be used. Yet it is quite clear that if the trust had been created with an express reference to any of these matters, it would have been valid. It is equally a valid limitation when tacitly ascertained by the belief and practice of the body when the trust was created.

Again, in the discipline of 1859, there is a section upon "Plainness in Dress, Address, &c." This is intended to prevent "conformity to the vain and changeable fashions of the world," a principle, the adoption of which may make us appear singular, yet it is not without its use, it is like a hedge which, though it make not the ground fruitful, frequently prevents those intrusions by which the labour of the husbandman is destroyed. It then says "we are bound to differ from the world in several respects; such as using the singular number in speaking to a single person; our disuse of the title of "master" and "mistress," &c., in a complimentary manner to such as do not stand in those relations to us." All are exhorted to consider seriously the plainness and simplicity which the gospel enjoins. The reason for it cannot be considered a vain or useless one: "A declension herein is attended with hurtful consequences in many respects, besides opening the way for some of our youth more easily and unobservedly to attend places of

public resort, for the exercise of sports, plays, and other pernicious diversions." The value and importance of this subject is marked by the closing passage: "If any should so far deviate from good order in these respects as to bring reproach upon our Society, Monthly Meetings are at liberty to disown them."

The corresponding section in the new discipline is very much curtailed, and is confined to an exhortation to bear a faithful testimony against all extravagance. And as to dress—"Let comfort, convenience, and utility be considered rather than the useless and expensive fashion of the time. And to manifest in dress, furniture of houses, &c., that their affections are not set on things of earth, but that they are following Him who is 'holy, harmless, undefiled and separate from sinners.'"

It contains nothing about simplicity of language by using the singular in speaking to a single person, nor against using complimentary titles, nor does it make any variance from its recommendation, liable to the penalty of disownment.

My duty is not to say which I prefer, or which seems to me the better course in such matters, but to ascertain if this subject was differently viewed in the two disciplines, and if it was considered a material and important matter in the former; and it seems to me that the great value and importance attached to it by the parties when united is evident from the language of the discipline, so great indeed as to justify exclusion from the body for want of conformity.

In the view of the doctrines of Christianity prefixed to the discipline of 1859, in regard to the Resurrection, it is said: "Concerning the resurrection of the dead, what the Holy Scriptures plainly declare and testify in these matters, we have been always ready to embrace. Howbeit, we esteem it very unnecessary to dispute or question how the dead are raised, or with what body they come; but rather submit that to the wisdom and pleasure of Almighty God. Upon this interesting subject it is sufficient to refer

to the teachings of our Lord Jesus Christ, and to the writings of the Apostles upon it."

The new discipline somewhat alters this statement, but as altered it is partly in conformity with a testimony given forth by Friends at Philadelphia in 1695, and comprised in the discipline of 1859, p. 22. But in the new discipline a clause is added affirming that the punishment of the wicked, and the blessedness of the righteous, shall be alike everlasting. I do not think any evidence was given shewing this to be an opinion of the body previously, and it commits it to a positive declaration upon a subject which we know is a matter of great controversy in other bodies.

Again, in the discipline of 1859 it is provided that when it shall appear to the Preparative Meeting of Ministers and Elders, that a friend is so far advanced in experience as to be qualified for the important trust of Elder in the Church, and the meeting shall judge that it would be useful to appoint him to that station, the same mode of proceeding in making the appointment is to be pursued as is directed in acknowledging ministers, *i.e.*, by informing the Quarterly Meeting, and if the Quarterly Meeting concur, it is to return information to the Preparative Meeting, with liberty to propose it to the Monthly Meeting, which is to appoint a committee to consider any objection and report. If the Monthly Meeting unite, and having obtained the approbation of the Women's Meeting, the friend is then to be a member of the Meeting of Ministers and Elders. There is no limitation of the time for which the appointment is to be made. It lasts for life, or during good behaviour, or until the cessation of the Elder's usefulness. And it is one of the duties especially incumbent on the elders to watch over and guard the ministry. In the new discipline the mode of appointment is changed, and the elders are to be appointed for a period of three years. This may or may not be a very proper change, but it is an important one, considering the duties imposed on the Elders, and it is strongly objected to by those who insist upon the practice of the Church being preserved as under the discipline of

1859; and not only did the new disciples establish a different tenure of office for Elders, but the Yearly Meeting recommended the Subordinate Meetings to appoint Elders for three years, as soon as the new discipline came into force; those already appointed continuing only until such appointments were made.

Again, in the discipline of 1859, in reference to meetings for worship and discipline, it is said that experience has abundantly shown that when they are attended in humility and the fear of the Lord, with a single eye to his honour, and the benefit and edification one of another, they do not require man to preside in them; being favoured with spiritual aid and directions from the Holy Head, by which Friends are preserved in harmony and Christian condescension: "It is, therefore, the indispensable duty of Friends, in their meetings for the exercise of the discipline, humbly to wait for Divine influence, which will indue with patience, and qualify them in their several stations and movements, to build up one another in that faith which works by love, to the purifying of the heart." The passage within inverted commas is omitted in the new discipline.

This is one of the alterations which seems to me to change the order of the Society, the injunction to wait humbly for the Divine influence is removed; and Mr. Woodward, a minister, and a witness for the plaintiffs, while he says there is no change made in profession, says that there is a quite evident change in practice; there is less silence now. It is a removal of one of the distinctive peculiarities of the Friends meetings, and I think the evidence shows that some of the ministers belonging to the Progressive party were in the habit when officiating at West Lake to begin worship at once on entering the meeting house without waiting for Divine influence at all, and saying that they considered one anointing of the Spirit sufficient, they were always full, they did not need repeated anointings.

The discipline of 1859 discouraged marriage between Friends and persons not members of the Society; and

parents, overseers, and other concerned Friends were in a gentle tender manner, to endeavour to shew them the unhappy consequences which might ensue from such connections. This is omitted from the new discipline.

The new discipline contains a statement as to the mode of determining questions in meetings: "Although it is not the practice of Friends to determine questions by simple numerical majorities, yet, after deliberate and full consideration the prevailing opinion or judgment, expressed or assented to by the members present, is to be recorded by the clerk as the judgment of the meeting. Upon the introduction of new and unusual propositions, however, though approved by the most of the meeting, the request of a few members, for further time for consideration, is generally granted." The effect of this is to introduce the principle of carrying measures by the majority of votes contrary to the previous practice of Friends, as it is stated, in the clause itself.

There is evidence in this case given on behalf both of the plaintiffs and defendants, that unanimity was as a general rule required at meetings—if not unanimous the matter was laid over. As stated in *Earl v. Wood*, 8 Cush. Mass. 430, the mode of acting was not by a numerical or any other fixed majority of votes, given by those authorized and qualified to give a voice upon any question; but upon the solid sense of the aggregate body, having regard to age, character, judgment, piety, and numbers combined, to be gathered and ascertained by the clerk, who is uniformly the presiding officer. In *Harrison v. Hoyle*, *supra*, Welch, C. J., interprets *solid sense* when applied to an aggregate of individuals, to mean the sense or opinion of *the whole*, just as *in solido* means by the whole, or as consolidate means to unite many in *one*. But whether the original mode of voting was to require unanimity, or the solid sense in the mode mentioned by Shaw, C. J., it is clear that the new discipline introduces a most material change in the order of the Society, by which a simple majority *may* carry any

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The discipline of 1859 contains an article "On Free Gospel Ministry." "As it is by the immediate teaching and influence of the Holy Spirit that acceptable worship is performed, and Gospel Ministry brought forth, as this powerful influence is the essential qualification for the work, and as the gift is divine, the service should be faithfully and freely performed, without any view to reward from man, in accordance with the precept of our Saviour, "Freely ye have received, freely give." Should any Friend be so regardless of this testimony as to give or receive anything as compensation for preaching, he should be faithfully laboured with in love and tenderness, to convince him of and reclaim him from his error; but if these brotherly and Christian endeavors prove ineffectual, and he persist in his unfaithfulness, the Monthly Meeting is at liberty to disown him."

George Fox, in his journal, repeatedly insisted upon this free service, and denounced the hirelings who made a trade of the Scriptures: (*Fox's Journal*, in one vol., published at The Friends' Book Store, Phil., without date.) At p. 76, he says: "But the black, earthly spirit of the priests, wounded my life; and when I heard the bell toll to call people together to the steeple-house, it struck at my life; for it was like a market bell to gather people together, that the priest might set forth his wares for sale. Oh! the vast sums of money that are got by the trade they make of selling the Scriptures, and by their preaching, from the highest bishop to the lowest priest! What one trade else in the world is comparable to it? Notwithstanding the Scriptures were given forth freely, Christ commanded his ministers to preach freely, and the prophets and apostles denounced judgment against all covetous hirelings and diviners for money. But in this free Spirit of the Lord Jesus was I sent forth to declare the word of life and reconciliation, freely, that all might come to Christ, who gives freely, and renews us into the image of God, which man and woman were in before they fell, that they might sit down in the heavenly places in Christ Jesus." He dis-

cusses the subject at large in even more vigorous language at p. 165, and again at pp. 176, 177, and at p. 452.

But the new discipline is silent on this subject. The article in the old is omitted. That it was a material point in the order of the Church cannot be doubted, since a violation of it subjected to disownment. The omission of the testimony, and of the penalty, must be considered as leaving it discretionary with ministers to accept reward for their services. And in one instance it was shewn that a minister, Mr. Woodward, a witness for the plaintiffs, acted upon this, and does receive remuneration for his services. He admitted the fact of receiving the money, but explained that his constraining motive to preach the Gospel is the apprehension of the will of God, not on account of the amount provided by the Friends for the support of his family.

I do not doubt that this is his constraining motive, but it does not do away with the fact of receiving the allowance.

A great deal of evidence was given by the defendants to establish, and in my opinion did establish, that individual ministers of the Progressive party taught and preached at West Lake doctrines at variance with those held by the Society of Friends, on the various matters mentioned in the particulars given by the defendants under the order ; but as it does not appear that those have been adopted by the plaintiffs, who in fact now disown them, and as they do not seem to be embodied in the new discipline, I do not think the plaintiffs should be affected by them.

There are some matters however as to the mode of worship that require notice, viz : Reading of the Scriptures at meetings ; and singing psalms or hymns. The defendants do not deny that both may be done, if prompted by the Holy Spirit ; but that it should only be done in that case. Mr. Woodward tells us that he first introduced the reading of the Scriptures about twenty years ago, and that it is now quite common, and that he was among the first that practised singing in meeting. Mr. Woodward was

then connected with a Yearly Meeting in the United States. But the practice has been introduced here, and has been used at West Lake.

Robert Barclay, one of the great authors of the society, disapproved of both. In the 11th proposition of his *Theses Theologicæ* he says: "All true and acceptable worship to God is offered in the *inward* and *immediate* moving and drawing of his own spirit, which is neither limited to places, times nor persons; for though we be to worship him always, in that we are to fear before him, yet as to the outward signification thereof in prayers, praises, or preachings, we ought not to do it where or when we will, but where and when we are moved thereunto by the secret inspirations of his Spirit in our hearts, which God heareth and accepteth thereof, and is never wanting to move us thereunto, where need is, of which he himself is the alone proper judge. All other worship then, both praises, prayers, and preachings, which man sets about in his own will, and at his own appointment, which he can both begin and end at his pleasure, do or leave undone, as himself sees meet, whether they be a prescribed form, as a liturgy, or prayers conceived extemporarily by the natural strength and faculty of the mind, they are all but superstitious will worship and abominable idolatry in the sight of God, which are to be denied, rejected, and separated from in this day of his spiritual arising." And in the XIth proposition of his *Apology*, S. 26, as to the singing of psalms he says: "We confess these to be a part of God's worship, and very sweet and refreshing when it proceeds from a true sense of God's love in the heart, and arises from the divine influence of the Spirit, which leads souls to breathe forth either a sweet harmony or words suitable to the present condition * * But as for the formal customary way of singing, it hath no foundation in Scripture, nor any ground in true Christianity." George Fox also speaks (p. 74) of singing in the spirit, and (p. 287), "James Lancaster was moved to sing with a melodious sound in the power of God."

Both these practices, which are avowedly innovations, and contrary to the tenets of the founders of the body, appear to me questions of importance in determining the identity of the body claiming the property.

Revival meetings are also some of the new methods of the Progressives. Woodward approves of and practices them ; he has held them for six weeks at a time. They began twenty years ago. They are, he says, similar to protracted meetings. A few were held in West Lake last winter in which he took part. Uptegraff says, these meetings have been usual during the last dozen years, and they are a revival of the practice of the early age of the Church.

It is clear then that they were not part of the Church order, even down to 1861, when the title of this property was complete, and it is only at a much more recent date that they were introduced into Canada.

If we now call up the idea of a Quaker Meeting such as was held in 1821, and down to 1861 at least, the members of the Society in a sober and perhaps a quaint dress assembling in the meeting house, waiting humbly and reverently for the divine influence of the Holy Spirit before any one ventures to speak, perhaps waiting in vain and departing without a word having been spoken, no reading of the scriptures, and no singing, unless under the immediate direction of the Spirit ; with no pulpit or reading desks ; and contrast it with a meeting of the Progressives, in which the minister enters the meeting house and finds his congregation, as he may, undistinguishable by their dress and appearance from any other body of Christians, and without waiting for the influence of the Spirit, or after a very short delay, advancing to the pulpit and reading the Scriptures as an ordinary part of worship, and singing psalms or hymns also as an ordinary act of worship, and then holding revival meetings, unknown at the time when this trust was created ;—it appears to me very plain that the progressive body is not that which is identical with the body for whom the trust was declared :

more especially when the other points of Church order and organization that I have already spoken of are taken into account.

The defendants, though a minority of the body, have kept up their organization of Preparative, Monthly, Quarterly, or Four Monthly, and Yearly Meetings.

A great deal of the discussion before me was as to the regularity of the proceedings at the Yearly Meeting of 1880, when the new discipline was adopted, and as to the defendants having assented to it. I may, however, say as to one argument, viz.: that the plaintiffs' Yearly Meeting held at Norwich instead of Pickering was illegal, and that the defendants' meeting at Pickering that year was therefore the only legal one, that from the opinion I have formed as to the supreme and independent power of the Yearly Meeting, there was nothing to prevent them from holding their meeting where they pleased. When the Canada Yearly Meeting was set off it was indeed appointed to be held in 1867 at Pickering, but nothing was said as to future meetings, nor do I think it would have mattered if there had, for the New Meeting was supreme, owing allegiance to no other, and having the complete control of its own meetings.

The subject of a revision of the discipline was first suggested by the Pelham Quarterly Meeting, in 1879, and the revision of the discipline was referred to the Representative Meeting. In 1880 the representative meeting seems to have reported in favour of the New York Discipline of 1877, and the same day the report was received the New York discipline was read as far as p. 38, and it was proceeded with and concluded on the following day, and adopted, and ordered to come into force on the 1st of January, 1881. The proceedings at that meeting are variously given in the evidence. Mr. Barker, a witness for the plaintiffs, says, quite a number objected to the discipline after it was all read, on the ground of haste. He thinks they all withdrew the objection—not expressly, no one did that—but they acquiesced by agreeing to its coming into force at

the beginning of the year. Nicholson, the clerk, says that the opponents expressed themselves strongly—none withdrew verbally—*he thought it due to the majority to declare it carried*. Majority rules, he says, with some exceptions, age, religious experience, &c. He and the women's clerk agreed that two-thirds nearly of the meeting accepted the discipline, about one-sixth were only opposed to its adoption at once. There was no dissent from the determination that it should come into force at the first of the following year. W. Spencer thought about 65 per cent. were in favour of adoption of the new discipline—of the 35 per cent. opposed some did so only for delay. He understood the objection was in submission to the majority, especially from the subsequent action being unanimous as to time of coming into force. On cross-examination, he says, it is necessary that submission should be express, he did not hear any such. A number of other witnesses of the plaintiffs are to the same effect.

On the other hand Mrs. Varney, a very intelligent woman, and a preacher, who was present at the Yearly Meeting of 1880, says there was a great deal of opposition to the adoption of the new discipline, she opposed it publicly in the meeting, and so did others, half the women were against it, and nearly half the men. She opposed it because she did not know its contents, the opposition was never withdrawn. The opponents were of the oldest standing—ministers and elders. When unanimity is not obtained the rule was, to lay it over. No objection, she says, was made to the minute, because it was not the practice to object to anything so entered.

Joshua Richardson opposed the adoption of the new discipline; never withdrew his opposition; he asked further time to consider it—to let it lie over for a year—had never seen it before nor heard it read—thought the meeting pretty evenly balanced.

Anthony Haight, one of the plaintiffs, says he always understood that the basis of their meetings was unity; if any oppose a measure the clerk cannot minute it, and it is

laid over till another meeting. When the Yearly Meeting was nearly equally divided as to the adoption of a measure, the clerk ought not to minute it as carried. If in such a case he made a minute he (Haight) would not think the minority bound by it, though they made no motion to amend the minute.

B. W. Wood was strongly in favour of deferring the adoption of the new discipline, as he knew nothing about it, and so with others, he made this known. He judges that half and the weightier part of the meeting opposed it, did not withdraw objections, did not know until the meeting that the new discipline was to be brought up.

Mary Ann Valentine opposed the adoption of the discipline at the Yearly Meeting in 1880. The clerk read it, but it was impossible to digest it. The meeting was pretty evenly divided. Asked that consideration be postponed for a year—it was carried in spite of that. Did not withdraw opposition nor give up any of the objections. Unity or unanimity was the rule of the Friends' Meetings, and the clerk should not have framed the minutes when the parties were not unanimous.

The minority among whom were the defendants and those of like mind, believed they had reason to apprehend that serious changes in doctrine might lurk under the apparently plain language of the new discipline, because for some years ministers from Yearly Meetings in the United States had been among them, and preached and practised some of the progressive doctrines and changes in discipline there in vogue. This had been the cause of much sorrow and discontent in the West Lake Monthly Meeting, the plaintiffs assenting to the new doctrines, the defendants remonstrating and protesting against them. The request for delay at the Yearly Meeting was not therefore a mere captious objection, but it was made with the earnest intention of having an opportunity of studying the proposed changes.

Without going through all the evidence minutely as to the mode in which the new discipline was adopted, and

which certainly seems to me at variance with the rules of procedure in this body, and even with the provision of the new discipline itself, that where a new and unusual proposition is introduced, though approved by the most of the meeting, the request of a few members for further time for consideration is usually granted, I am quite satisfied that the new discipline, supposing the proceedings regular, was not carried in such a way as to be binding upon the defendants : that they never assented to it—never withdrew their objections, and ceased their open opposition when the minute was made in compliance with the usual practice of the body, but not acquiescing in or approving it ; and did nothing to prevent them from taking the position they now do in opposition to it.

I have not been referred to any express rule in Quaker discipline requiring proposed changes of importance to be submitted to the inferior tribunals before passing into law, similar to the Barrier Act in the Presbyterian body, which provides that no proposed law or rule relative to matters of doctrine, discipline, government, or worship, shall become a permanent enactment until it has been submitted to Presbyteries for consideration.

But I apprehend that the usual practice of the Quakers was, to send proposed changes of importance to the Monthly or Quarterly Meetings for consideration before finally adopting them. When the New York discipline was revised in 1800, the Meetings had previously been furnished with written copies, one to each meeting. It does not appear whether this was done or not upon the occasion of the subsequent revisions of 1810, 1859, and 1877, but it may fairly be assumed that the same course was adopted.

In the various revisions of the discipline of the New England Yearly Meeting, great care seems to have been taken to have any proposed alterations considered by large committees with ample time for deliberation. In 1868 there seems to have been three years between the appointment of the committee and their report, and in

1871 the Yearly Meeting referred the report back to the committee with a direction to cause 500 copies to be printed and sent down to the Monthly Meetings for distribution, as soon as practicable, in order that all Friends might have an opportunity to examine the work, and make any suggestions they might desire to the committee, which they were encouraged to be prompt in doing. And in 1872, the committee reported that they had caused the 500 copies to be printed, and distributed in the usual proportion among Friends in the several Quarterly Meetings. The revised discipline was then read and considered during four joint sessions, and passed in the fifth.

Assuming, however, the new discipline to have been regularly carried so as to bind those who approve of it, it establishes a body not identical with that in whose favour the trust is.

The West Lake Four Months' Meeting of Women Friends on the 5th of February, 1881, made a minute that they were not united to adopt the New York discipline. On the same day the Mens' Meeting recommended the subordinate meetings to use it as directed by the Yearly Meeting. On the 17th of February, 1881, the Monthly Meeting determined to act in compliance with the recommendation of the Four Months' Meeting.

The plaintiffs are careful to assert that they are in unity with the London Yearly Meeting; and there is some evidence to shew that the progressive spirit has taken possession of it also; and I think it may fairly be assumed that the London Yearly Meeting now is not identical with the London Yearly Meeting of 1835, while it is established that the defendants' Monthly Meeting continues to be the same body in doctrine, order, and discipline, as it was in 1835; and if it is not in unity with the London Yearly Meeting, it is because that meeting is not the same as it was in 1835, a condition required by the deed of that date.

I think, upon the whole, therefore, that the plaintiffs' case fails, and their action is dismissed, with costs; and on

the defendants' counter-claim there will be a declaration that the defendants' trustees, John Garratt, Levi Bowerman, and Amos Bowerman, appointed April 19th, 1883, hold the land in question, in trust for the West Lake Monthly Meeting of Friends, as represented by the defendants; and the plaintiffs are restrained from disturbing the defendants or their trustees in the sole use and enjoyment of the property, with costs.

This is not a case for damages.

I have not overlooked the objections to the appointment of the trustees by the defendants, viz.: that they were appointed at the same meeting at which the mode of appointment was determined: that they were appointed to hold for the West Lake Monthly Meeting of Friends to be exclusively composed of persons who conform to the discipline of 1859, not to hold on the trusts of the deed—and that the trustees were also appointed trustees of the Wellington property, of which no notice was given; but I do not think any of them valid.

There does not seem to me to be anything in the 10th section of R. S. O. ch. 216, to require the mode of appointment to be determined at one meeting, and the appointment itself made at another; these may both be done at the one meeting.

As to the second,—the religious denomination on whose behalf the lands were originally granted was a denomination holding doctrines and principles of order and government, the same as those which were afterwards collected in the discipline of 1859, according to the view I have taken of the subject; and where there is a conflict between two competing bodies for the property, it seems to me very proper to specify which of them is intended by the appointment, while it in no wise varies the trust on which the property is held.

As to the last objection, it is quite possible that the appointment as to the Wellington property may be invalid, but that property is not in question in this suit, and I have no materials on which I can judge of its validity or

otherwise,—but even if invalid as to that, it could not have the effect of invalidating the appointment to the property now in question.

This case has been carried to the Court of Appeal.

A. H. F. L.

[CHANCERY DIVISION.]

RE MORTON.

AND

LOT NO. 6 ON PLAN NO. 580, IN THE COUNTY OF YORK

Vendors and Purchasers Act—R. S. O. c. 109—Tax title—Necessary proof—Treasurer's books and returns—Treasurer's certificate.

On an application under the Vendors and Purchasers Act, R. S. O. c. 109, to compel a purchaser to carry out a purchase, it was shewn that the vendor claimed through a tax sale, and had declined to produce any further evidence of the validity of the tax sale than the Treasurer's deed, and what might be obtained from the Treasurer's books, returns and warrants to which he referred the purchaser.

Held, that the Treasurer's lists of lands in arrear for taxes furnished to the Warden would be as valid evidence of the non-payment, as the Treasurer's warrant to the Sheriff under 16 Vic. c. 182, s. 55, was held to be by the judgment in *Clarke v. Buchanan*, 25 Gr. 559; and that coupled with the warrant from the Warden they would be conclusive, and would afford evidence of non-payment up to the time of the sale.

Held, also, that the certificate of the Treasurer that the land was not redeemed is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty. More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties.

THIS was an application under the Vendors and Purchasers Act, R. S. O. c. 109, made by Mary S. Morton, to compel the trustees of the York Station Methodist Church to accept the title, in so far as the validity of a tax sale was concerned, of the above lot.

The petition set out that the property was duly assessed as non-resident lands: that being in arrear for taxes the township treasurer returned it as such to the

county treasurer: that the county treasurer submitted a list to the warden containing it as land liable to be sold for taxes: that a warrant having been issued the land was duly advertised and sold, and, not having been redeemed, was conveyed to the purchaser, through whom the vendor claimed: that the books of the office of the treasurer and the official lists and returns show that the taxes were in arrear, and were never paid, and that the vendor produced no further evidence of the assessment, non-payment of taxes, and sale and conveyance, than the said books of office, returns, warrant, and conveyance contained: that the purchaser demanded that the vendor should furnish conclusive proof outside of said books of office, returns, warrant and conveyance, that the taxes were unpaid by the owner when the sale was made, and claimed that they were not bound to take the said title on the evidence contained in the treasurer's office only.

The petition was argued, on the 1st of October, 1884, before Proudfoot, J.

E. D. Armour, for the vendor. When it was enacted that lands should be sold to pay taxes it was not intended that the purchaser should be in such a position that he could not afterwards dispose of the lands. To compel him to search for the former owner would be to compel him in many cases to run the risk of a law suit by a disappointed owner. When he has paid a public debt he is entitled to rely upon the public records of the sale contained in the proper office, viz.: the county treasurer's. The course of recent legislation shows that the policy of the law is to make tax titles marketable titles. In *Smith v. Midland R. W. Co.*, 4 O. R. 494, the Chancellor pointed to the penalty clause of the Act, R. S. O. cap. 180, sec. 115, as giving the owner his remedy in case any irregularity has taken place in the sale proceedings, and to the limitation clause (sec. 156) as confirming his title. The records in the treasurer's office, in this case, are complete, and are *prima facie* evidence that the steps which they represent

were severally taken. We must assume that the officers who took the respective steps did so honestly in the performance of their public duties. This shifts the *onus* upon the purchaser to show the irregularity, if any.

F. E. Hodgins, for the purchasers. *Primâ facie* evidence of a fact is not sufficient between vendor and purchaser. The evidence should be conclusive, or, at least, so satisfactory as to leave little doubt that the fact is as alleged by the vendor. Here, although the *primâ facie* evidence is complete, it is quite possible for the owner to have paid the taxes, and that the collector who received them misappropriated them, or applied them to the wrong lot. If so, the tax sale would be bad: *Proudfoot v. Austin*, 21 Gr. 566; *McKay v. Crysler*, 3 S. C. R. 436; *Charlton v. Watson*, 4 O. R. 489.

These cases shew that although in ejectment *primâ facie* evidence of regularity is sufficient to shift the *onus* of proof from the plaintiff, yet if no taxes were actually in arrear the sale is bad, and the plaintiff has no title. In *Smith v. Midland R. W. Co.*, 4. O. R. 494, taxes were actually in arrear. A purchaser will not be forced to take the title if there is a possibility of the title being bad, and as the Act works a forfeiture, the mode adopted to accomplish the forfeiture must be strictly proved: *Laws v. Lush*, 14 Ver. 547; *Webb v. Kirby*, 3 Sm. & G. 333, 7 DeG. M. & G. 376; *Taylor* on Titles, 15. The purchaser is at all events entitled to a statutory declaration by the collector that no taxes were paid to him. If the owner can be found efforts should be made to get evidence from him, and if there were actually arrears on which the sale took place the owner cannot set aside the sale, as R. S. O. c. 180, s. 156, would bar him. The evidence proper in such a case in Quieting Titles matters is mentioned in *Taylor*, on Titles, 167, 169, 170.

October 2, 1884. PROUDFOOT, J.—The vendor claims title under a sale for taxes, and more than two years have elapsed since he obtained his deed.

As the healing clause in the Assessment Act does not validate a title where there were in fact no taxes in arrear—*Charlton v. Watson*, 4 Ont. 489, (in which two years had elapsed after maturity of deed)—the purchaser thinks himself entitled to evidence that the taxes had not been paid, and is not satisfied with the entries in the treasurer's books.

I think he is entitled to some evidence of non-payment.

Under the 16 Vic. c. 182, s. 55, the treasurer issued his warrant to the sheriff commanding him to levy, &c. In *Clarke v. Buchanan*, 25 Gr. 559, the production of this warrant directing the sale was held to be sufficient evidence of the taxes having been in arrear, settling the question that was left open for argument in *Hall v. Hill*, 22 U. C. R. 581.

By the R. S. O. c. 180, s. 127, the treasurer is to submit to the warden a list in duplicate of the lands liable to be sold for taxes, and the warden is to authenticate each of the lists by affixing the seal of the corporation and his signature, and returns one to the treasurer with a warrant directing him to sell, and then the treasurer is to make the sale.

As the warden acts upon the lists furnished to him by the treasurer, I think these lists would be as valid evidence of the non-payment as the warrant to the sheriff under the former statute, and coupled with the warrant from the warden there would be no doubt of it.

This would afford evidence of non-payment up to the time of the sale.

As the redemption of the land during the year allowed for that purpose is to be effected by paying the money to the treasurer (R. S. O. c. 180, s. 147), the evidence of the treasurer of non-payment during that time should suffice. The deed executed by the treasurer and the warden would seem to be evidence of the fact, on the presumption that everything was correctly done by these officers in the discharge of their public duty, a presumption that was acted on in *Clarke v. Buchanan*, *supra*. But on account of the

remarks of Gwynne, J., in *McKay v. Cryslar*, 3 S. C. 436, on the application of this maxim to tax sales, something more may reasonably be required. I think the certificate of the treasurer that the land was not redeemed ought to suffice. I do not think that an affidavit can be required from a public officer as to the proper discharge of his duty.

In most of the reported cases the owner, or persons claiming under him, were parties to the suits, and all that would be necessary to prove in favour of the title would be, the assessment and the sale, for if it was intended to invalidate the sale because the taxes had been paid the proof of payment would be made by the party asserting it. Thus in *Proudfoot v. Austin*, 21 Gr. 566, the only evidence required, and given, as appears from the statement of Gwynne, J., in 3 S. C. 483, was the collector's rolls and the sale.

I agree with Mr. Hodgins that the case is different as between the vendor and a purchaser who does not claim under the owner. But the evidence indicated above should suffice.

G. A. B.

[QUEEN'S BENCH DIVISION.]

MCLAREN V. THE COMMERCIAL UNION ASSURANCE
COMPANY.

(SPECIAL CASE.)

Fire Insurance—Damage by removal of goods—Salvages.

The plaintiff's stock-in-trade was insured against loss by fire in the defendant company, a fire occurred in an adjoining building, and the plaintiff's warehouse being in danger of destruction, he removed his stock which was thereby damaged, and some of it lost.

Held, that there was a loss covered by the policy, and no salvage to which the defendants were liable to contribute under the fifth statutory condition, which declared that in case of removal of the property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage.

THE plaintiff, by a policy of insurance, dated May 10th, 1884, effected an insurance in the defendants' company for \$1,000, against loss or damage by fire, upon his stock-in-trade in a store occupied by him, on South Water street, in the town of Port Arthur.

The policy was granted upon the stipulations and conditions thereon endorsed, being the statutory conditions contained in the schedule to chapter 162, R. S. O.

The application stated the stock value as being at that time \$6,000, and further stated that stock had just been taken.

The plaintiff's stock was, during the next two months, increased until, at the time of the fire, it was of the value of \$14,500.

During the currency of the policy, and on or about June 21st, 1884, a fire occurred in an adjoining building, from which the plaintiff's building was several times set alight, and put in danger of being consumed; but the fire was extinguished without injury from fire to the stock.

During the fire the stock was removed by the plaintiff for fear of destruction by fire, and, by breakage and injury during such removal and loss of goods before it could be got to a place of safety, was injured to the extent of \$1,450.

The question for the consideration of this Court was, whether, on the case stated, the plaintiff was entitled to recover from defendants the full amount of the policy; or whether the defendants were discharged by a ratable payment. If the Court should be of opinion that the plaintiffs were entitled to recover the full amount of the policy, a verdict was to be entered for the plaintiff for \$1,000; but if the Court should be of opinion that the defendants were discharged by a ratable payment, then a verdict was to be entered for the plaintiffs for \$100, the costs and interest to be in the discretion of the Court.

Moss, Q.C., for the plaintiff.

W. A. Reeve, contra.

The authorities cited are referred to in the judgment.

October 31st, 1884. OSLER, J. A.—The statutory condition on which the defendants rely in support of their contention is the following: "5. Where the property insured is only partially damaged, no abandonment of the same will be allowed unless by consent of the company or its agent; and in case of the removal of property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage."

The special case admits that the building in which the plaintiff's goods were contained was several times on fire during the destruction of the adjoining building, and was in danger of being consumed: that the property insured was removed in order to escape destruction, and, in effect, that such removal was reasonable. The damage caused during the removal by breakage and loss of goods was \$1450.

The first question, and one the answer to which seems to me really decisive of the case, is, whether damage thus caused is within the policy. The great weight of authority is, that in such case the fire is looked upon as the proximate cause of the damage, and that the policy covers it unless excluded by its terms.

In *May on Insurance*, 2nd Am. ed., p. 612, s. 404, it is said: "Damages resulting from *bond fide* efforts to save the property from the fire, as by water and breakage by removal, and by loss or theft consequent upon exposure occasioned by the fire, are within the loss covered by a policy against damage by fire."

So in *Phillips on Insurance*, 5th Am. ed., p. 634-635, sec. 1098a: "The underwriters are liable for damage to the subject and expense directly incidental or consequent to the fire; as damage to the insured goods by water thrown on to extinguish the fire, and the expense of removing the insured property from the fire."

Wood on Insurance is to the same effect, pp. 216, 773.

Among the numerous authorities referred to in these works is one cited by Mr. Moss, in our own Court of Queen's Bench, viz., *Thompson v. Montreal Ins. Co.* 6 U. C. R. 319, which is not fairly distinguishable from the present case. The condition in the policy is verbatim the same. The insurance was, as here, upon a part only of the value of the goods insured. I do not see that the fact that in this case the quantity of stock on hand at the time of the fire was very much greater than at the time the policy was made can make any difference. The Court say, at p. 326, that the condition in the policy has "no reference to anything but the mere expenses of saving what has escaped destruction, and cannot be distorted into a stipulation that the assured must go without indemnity for any part of the destruction which his property has suffered, and which his insurance covers."

It can only be said that in the present case there was a total loss to the amount covered by the policy, of which loss the fire was the proximate cause; and for that reason there is no salvage, to the expense and loss connected with which the defendants are liable to contribute under the condition.

The plaintiff is, therefore, in my opinion, entitled to judgment on the special case, viz., \$1,000 (with interest), and costs of suit.

Judgment accordingly.

[CHANCERY DIVISION.]

HALLIWELL V. THE INCORPORATED SYNOD OF THE DIOCESE
OF ONTARIO ET AL.*Revocation of license to clergyman by Bishop without trial—Diocesan Court.*

The Rev. J. H. being the incumbent of a parish in the Diocese of Ontario, which was endowed, and having acted in such capacity and performed the duties thereof for several years, discontinued the services in two other churches which were attached to his parish. A commission was issued by the Bishop under the Canon in that behalf of the Synod of the said Diocese, No. 8, "To enquire into the causes which led to the closing of the said churches, and to report whether there was lawful excuse for the said Rev. J. H.'s discontinuance of the exercise of his ministerial offices in said churches, and to report whether there was sufficient *prima facie* ground for instituting further proceedings against the said Rev. J. H. as provided by said Canon."

The Commissioners reported that the churches had been closed "because the members of the church refused to attend and provide for the ministrations of the Rev. J. H. in these churches:" that an estrangement existed between the said Rev. J. H. and his parishioners, and they decline his ministrations. But that in their opinion (the commissioner's) the proofs adduced were not of such a nature as could be relied on to procure a conviction in an Ecclesiastical Court: and they declined to recommend the prosecution of further legal action, although they believed there was no hope of a restoration of his ministerial usefulness there, and that there was a *prima facie* ground for instituting further proceedings against him as provided by the Canon; but they were of opinion that without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said Canon being sustained." After the making of this report, and upon the said Rev. J. H. refusing to resign his said incumbency, the Bishop, by an instrument under seal, revoked, or purported to revoke, his license, and appointed the Rev. A. E. T. as his successor, and the Synod declined to pay him (the Rev. J. H.) the annual proceeds of the endowment. Upon an action being brought by the Rev. J. H. to compel the Synod to pay him such proceeds. It was—

Held, that the offences (if any) came within the second section of the Canon; that any one charged with such an offence has the right to be tried, under section one, by the Diocesan Court, and has the right of appeal to the Metropolitan, under section thirteen; that the Bishop had not the power to cancel and annul the license of the plaintiff, either without or for cause, without a trial by the Diocesan Court; and that the plaintiff must succeed.

Held, also, that the general word "immorality" as used in the Canon was not restricted by the words following, specifying particular offences, for such offences were not of the same nature as the general word.

THIS was an action brought by the Rev. John Halliwell against The Incorporated Synod of the Diocese of Ontario and the Rev. Alfred Ford Ecklin.

The plaintiff's statement of claim alleged, that he was a

Clerk in Holy Orders in the Church of England duly licensed; that he was, and had been, for some years incumbent of Christ's Church, in the township of Hillier, and, as such, entitled to the annual income of the endowment thereof, which endowment was set out: that the defendants, the Synod, were the trustees of the said endowment, and had always, up to the 4th October, 1882, paid him the annual income thereof, but that since that date they had refused to do so on the ground, as they alleged, that the plaintiff's license had been revoked by the Bishop of the Diocese: that the Bishop did attempt, without reason, to revoke the plaintiff's license, but that such attempted revocation was illegal and void; that the said Synod alleged that the defendant Ecklin had been licensed and appointed incumbent of said Christ's Church by the Bishop; that no legal cancellation of the license of the plaintiff had ever taken place, and no legal license to the said Ecklin had ever been granted. And the plaintiff asked that the defendants, the Synod, should be ordered to pay him the said income arising from said endowment, and his costs.

The statement of defence of the Synod admitted the existence of the endowment, and that they were trustees thereof. It stated that they were desirous of managing and disposing of the same in accordance with the terms of the trust: that they had been notified by the Bishop that the license of the said plaintiff had been cancelled, and that the defendant Ecklin had been appointed as incumbent of said Christ's Church, and that by reason of such cancellation and appointment, the plaintiff was not entitled to said income: that the defendant Ecklin claimed the same: that they did not desire to interfere in the dispute, and were willing to abide by the decision of the Court.

The defendant Ecklin set up the endowment, the cancellation of the plaintiff's license, and his own appointment, and claimed the said income, and asked for his costs.

It was agreed between the counsel that the first point to be argued was, whether the Bishop had the power to cancel the license of a clergyman, when he had been licensed, with-

out proceedings being taken under the Canons of the Diocese, and acting on the finding of the commissioners so appointed; and if the Court should find the Bishop had such power, then, whether in the present case the Bishop was justified, under the circumstances to be adduced in evidence, in dealing with the plaintiff as he did.

In the proceedings to be taken it was agreed that the printed books (Canons) of the Diocese, and of the Diocese of Toronto should be taken and read as if the Canons, &c., therein found had been duly proved, also the printed proceedings of the Dioceses of Toronto and Ontario, &c., and the printed Canons and proceedings of the Provincial Synod, as if the originals were proved so far as the originals would be evidence in the case. The Bishop's patent was also to be put in.

It was also admitted that the plaintiff was licensed by the Bishop by letter to the mission of Hillier and Wellington in the year 1876, and that that license was cancelled or revoked on the 4th October, 1882, by the Bishop, the revocation being produced, and that he officiated from the time of his appointment up to the time of the revocation of his license.

It appeared from the documents put in, and the admissions of counsel, that the plaintiff was, and had been for some years, incumbent of Christ's Church, in the township of Hillier, which Church was entitled to an endowment under the will of one James Jones, Sr., which endowment was vested in the defendants the Synod, who had always paid the plaintiff the annual income derived therefrom up to the 4th of October, 1882: that there were two other Churches attached to the parish of Hillier, under the charge of the plaintiff, in which, for some reason, the plaintiff had discontinued conducting divine service: that the Bishop of the Diocese had issued a commission under Canon No. 8 of the Synod of the Diocese, to make enquiry into the causes which led to the closing of the Churches, and to report whether there had been lawful excuse for the plaintiff's discontinuance of the exercise of his ministerial offices

in said Churches, and to report whether there was sufficient *prima facie* ground for instituting further proceedings against the said plaintiff as made and provided by the 8th, Canon of the Synod of the Diocese of Ontario.

The case was set down for trial at the Spring Sittings of 1884, at Belleville, when it was by consent adjourned to Toronto on a certain understanding as to the basis of the argument which is fully set out hereafter, and it was heard there on the 23rd June, 1884, before Ferguson, J.

The report of the Commissioners was as follows :

Report of the Commissioners appointed by the Bishop to inquire into the causes that have led to the closing of the churches of St. Andrew's, Wellington, and St. Mark's, Gerow Gore.

After a patient hearing of the evidence offered, both by the Rev. J. Halliwell, and by the Parishioners, the Commissioners find that the churches at Wellington and Gerow Gore have been closed because the members of the Church refuse to attend and provide for the ministrations of the Rev. J. Halliwell in these Churches. The statement made was repeated and not contradicted, that not one person could be got to attend the Church services at Wellington were Mr. Halliwell to officiate.

The inquiry therefore resolved itself into an investigation of (1) the reasons that caused the unhappy estrangement between Mr. Halliwell and his parishioners, and (2) as to whether the antipathy to him was well or ill founded, and can be removed.

(1) The Commissioners find that the estrangement is caused primarily by a strong and generally felt conviction on the part of the parishioners, that Mr. Halliwell is painfully "*wanting in veracity*;" that "*his word cannot be relied on*:" that he does not scruple deliberately to make what he must know to be *false statements*. That in consequence of this wide spread conviction the parishioners have for the greater part "lost confidence" in Mr. Halliwell, and decline his ministrations as their clergyman.

The Commissioners pressed for such proofs of special circumstances as would bring home to Mr. Halliwell the repeated and general charge of "untruthfulness." Some of these were stated, but in the opinion of the Commissioners they are not of such a nature as could be relied on to procure a conviction in an ecclesiastical Court.

The Commissioners therefore do not recommend the prosecution of further legal action as contemplated by the Canon, although they are unanimously of opinion that the existing defection of the congregations from Mr. Halliwell's ministrations is mainly due (the cause below specified being also taken into consideration) to his own want of candour and straightforward dealing.

(2.) The Commissioners have to state that the antipathy now existing to Mr. Halliwell has also arisen in no little degree from the unfortunate necessity of his having had to engage in a law suit, known as the "*Jones Will Case*," which has affected the principal supporters of the Church in the parish. This has undoubtedly intensified an already or previously growing distrust from the above causes, and has produced an irreconcilable feeling of dislike to Mr. Halliwell.

The Commissioners believe that as long as Mr. Halliwell remains in the Parish there is no hope whatever of a restoration of his ministerial usefulness, and that the interests of the Church imperatively require his removal as quickly as possible.

The Commissioners have to report that the charges made against the Rev. E. Loucks, Rector of Picton, as having by his interference or intrusion contributed to the closing of the Churches, were withdrawn, and that Mr. Loucks was quite exonerated from any such interference or intrusion.

In conclusion, the Commissioners beg to report that if your Lordship presses for a distinct and specific answer to the question—"Whether there be sufficient *prima facie* ground for instituting further proceedings against the Rev. John Halliwell, as made and provided by Canon VIII. of the Synod of the Diocese of Ontario,"—the Commissioners will feel bound to answer in the affirmative; nevertheless the Commissioners are of the opinion that, without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said Canon being sustained.

All which is respectfully submitted.

(Signed by all the Commissioners.)

May 26, 1882.

The Bishop did not continue proceedings under the Canon, but after some correspondence in reference to the

plaintiff's resignation, wrote the letter of revocation referred to in the judgment and notified the Synod; and appointed the defendant Ecklin to the parish.

The Synod then refused to continue the payment of the income of the endowment to the plaintiff.

S. H. Blake, Q. C., for the plaintiff. The Bishop has no right, without following the rules of the Synod, merely because he is Bishop, to withdraw the plaintiff's license. There is a money question in this case, and therefore this Court has jurisdiction. If it was a mere question of the jurisdiction of the Bishop in which no civil right came in question then this Court might not be the proper *forum*. The Bishop has no power whatever to revoke the license of any clergyman in his diocese. There are two lines of authority: one, that the Bishop is virtually a dictator, and the other, that he is only a constitutional governor, and cannot go outside of the rules of the constitution. There is no authority for the proposition that the Bishop can act arbitrarily. The Bishop has consented to the Act passed by the Legislature 19 & 20 Vic. c. 141, and so has placed the power in other hands. [*Walkem*, Q. C. He had to submit to the Act whether he wished or not!] The Act was passed respecting "discipline, order, and good government of the Church," and under it the Synod have power to make regulations for the enforcing of discipline in the Church, for the appointment, deposition, deprivation, or removal of any person bearing office therein, &c." The constitution of the Synod is laid down at p. 46 of the Book of Canons of the Diocese; and Canon No. 8 at p. 56, which was passed "For the better enforcing discipline in the Church, and for the administration of the Diocesan Court;" provides how cases are to be treated when any Clerk in Holy Orders is charged with any of the offences mentioned in section 2. [*Walkem*, Q. C. The Bishop does not contend that he can try a clergyman outside of the provisions of the Canon. His contention is, that he has power independently of the Canon to revoke the license of any unbeneficed

clergyman in his Diocese, and that the plaintiff when appointed was such, or in other words he was the Bishop's curate, and could be dismissed at will.] I admit that a Rector has a right to appoint his own curates, and that they have no more rights than a clerk in an office. [It was then admitted by both counsel that when the plaintiff was appointed the parish of Hillier was a missionary parish, deriving aid from the Mission Board, and that it so continued up to the year 1880, when it became self-sustaining, and the plaintiff then from 1880 to 1882 received the income of the endowment of the parish. [FERGUSON, J. Does the parish cease to be a missionary parish on the withdrawal of mission aid?] There is no such office in the Church as missionary clergyman; the missionaries are ordained Priests and Deacons, but do not belong to any particular place. [It was then admitted by both counsel that Canon No. 8 reaches every Clerk in Holy Orders, whether Priest, Deacon, missionary, or otherwise.] When the mission aid was withdrawn from the parish, the plaintiff ceased to be a missionary or curate of the Bishop, and became the incumbent. The withdrawal of the missionary aid in 1880 cannot place him in a worse position than if he had in that year been inducted into the self-sustaining parish of Hillier as incumbent. The parish gives the *status* to the Priest whether he goes from a missionary parish to a rectory parish, or whether his own parish ceases to be a missionary parish, and becomes a rectory parish. When missionary parishes are receiving aid from the general funds of the Church, the Bishop should have a greater power of control over them. The question here is, whether the Bishop has the abstract right to dismiss without a trial. The evidence as to the cause may come up hereafter at the trial. There is no authority that the occupant of a Rectory only is a beneficed clergyman. A beneficed clergyman is one in occupation of a self sustaining parish.

Walkem, Q. C., for the defendant. The question of the jurisdiction of the Bishop over his clergy has been raised and

discussed in the Provincial Synod, the legislative body of the church. In "Journal of Provincial Synod" for 1862, (2nd Session), p. 86, may be found an opinion of the law officers of the Crown, embodied in a despatch to the Duke of Newcastle, on the subject of the powers of Colonial Bishops, in which it is said "that the salaries of the clergy are only receivable so long as they act under the Bishop's license, which license may be withdrawn at will." This opinion is embodied in a Memorial from the Diocese of Toronto, adopted on the 10th August, 1866, and presented to the Provincial Synod at its 5th session, in 1871, and that statement of the law was not questioned either by the Synod of Toronto or by the Provincial Synod, whose decisions govern, and are binding upon every member of the Church, including the plaintiff. The Synod of the Diocese of Toronto had, in the years of 1859 and 1860, for the guidance of the Bishops' Court, adopted, with some modifications, the provisions of the Church Discipline Act, which is printed in *Blunt's Book of Church Law* p. 441; *Consol Canons of Diocese of Toronto*, pp. 159, 296 and 297. Canon 8, of the Diocese of Ontario, was founded on the same Act. Yet since the passing of that Act in England it has been held that a Bishop may revoke the license of certain classes of Curates at pleasure: *Cripp's law of Church and Clergy*, 3rd ed. 162; *Phillimore's Eccl. Law*, 1183, 1184; *Gladstone's Case*; *Churchman's Year Book*, 1853, p. 186. All clergy in the Diocese excepting Rectors and Curates hold office the Bishop's appointment or license: *Cripp*, 3rd ed., 162, 163—and this license became revocable at pleasure: *Cripp*, 163. The Rectors alone are beneficed clergy in the technical sense, and hold office by institution and induction: *Stopford's Eccl. Law*, 59, 76, 77, 78. The meaning of "institution" will be found in *Blunt*, 208, 209, and in *Stopford*, p. 56. A Curate cannot officiate without the license of the Bishop: See the ordination service: *Cripp*, 3rd ed., 162, 163, 635, *et seq.*: Canon 36 of the canons of 1603: *Phillimore's, Eccl. Law*, 314, 315. Clergy who are members of Synod must be licensed by the Bishop: See *Canons*

Diocese of Ontario, p. 46. The revocation of a license by the Bishop is an act which he has power to perform, *qua* bishop: *Bishop of Natal v. Gladstone*, L. R. 3 Eq. 1. His power, Canon 8, on which the plaintiff relies, does not abrogate, for the canon is for the *better* enforcing discipline. It does not in terms take away the Bishop's inherent authority. It is not exhaustive, and relates only to cases of crime or immorality, leaving other disabilities such as unfitness, physical or otherwise, unprovided for. The words "crime" or "immorality" are limited in their meaning by the particular offences which follow them. The Bishop had therefore power to revoke the plaintiff's license independently of the canon, and the Court cannot review his action. The plaintiff, being by the withdrawal of his license disqualified from performing divine service, is not entitled to the benefit of the trust.

Blake, Q.C., in reply. The words "crime" or "immorality" in Canon 8, sec. 2, are very comprehensive, and must be given their full grammatical meaning.

September 4, 1884. FERGUSON, J.—The plaintiff alleges that he is a Clerk in the Holy Orders in the Church of England, duly licensed, and that he is the incumbent of Christ Church, in the township of Hillier: that under the will of one James Jones, Sr., certain sums of money were bequeathed to The Church Society of the Diocese of Toronto, the annual income and revenue thereof to be paid to the incumbent for the time being of the said Christ's Church: that subsequently the Diocese of Toronto was divided into the Dioceses of Toronto and Ontario: that the township of Hillier and the said Christ's Church are in the Diocese of Ontario: that the said trust funds, amounting to over \$6,000, became vested in the defendants the Synod of Ontario in trust, to invest the same and to pay the annual income derivable therefrom to the incumbent of the said Christ's Church, and that he, the plaintiff, as such incumbent, is entitled to the benefit arising from the said fund. The plaintiff also alleges that he has for many years been

incumbent as aforesaid, and that up to the month of October, 1882, the defendants the Synod of Ontario duly paid him the interest and income of the fund, but that since that date they have refused and declined to pay him any further sum, although there is due and payable to him on account thereof a considerable sum. And he asks that the defendants the Synod of Ontario may be ordered to pay him the said sum now overdue, and all moneys accruing due from time to time, and for the costs of the suit.

The defendants the Synod of Ontario by their defence say that the late Mr. Jones did devise a considerable amount of property upon trust, that the proceeds thereof should be invested in the purchase of land in the township of Hillier for the benefit of Christ's Church, Hillier, which lands should be held upon trust to appropriate and apply the rents and profits thereof, after deducting all such charges and disbursements as might be incurred in the care and management of the property, and in the execution of the trust, towards the support of the Incumbent or Minister of the Church of England officiating in Christ's Church, in Hillier, for all time to come: that the property is now vested in them: that they are anxious to dispose of, and manage the same in accordance with the trust: that excepting the sum of \$1,000, the property is invested in land according to the terms of the will, of which land the plaintiff has for several years been in possession, and that pending ultimate investment in land this \$1,000 is invested in a mortgage security, the interest of which is payable in accordance with the directions contained in the will. But they say that they have been notified by the Lord Bishop of the Diocese, that the plaintiff's right to officiate as Incumbent or Minister of the said church was cancelled and abrogated by the cancellation of his license by the said Lord Bishop, and by an inhibition issued by him and notified to the plaintiff on the 4th October, 1882; and further, that he, the Lord Bishop, had appointed and licensed the defendant, the Rev. A. F. Ecklin, as Incumbent or Minister of the said church in the place and stead of the

plaintiff, and that he, the defendant Rev. A. F. Ecklin, had become entitled to the benefit of the fund. They also say that the defendant Ecklin claims that since his appointment he is entitled to the income from the said investment, and to the use and occupation of the said lands, and has required them to pay him the said income, and to put him in possession of the said lands: that they cannot safely act in the administration of the trust until it shall have been determined which of the claimants is entitled to the benefit thereof: that they have no desire to interfere in the dispute between the claimants, and that they are prepared and willing to abide by the decision of the Court; and they claim their costs.

The defendant the Rev. A. F. Ecklin claims that he is entitled to the "revenues" of the trust, basing his claim upon the revocation and appointment above mentioned; and he further claims that in the event of his being held to be so entitled the plaintiff may be ordered to deliver to him possession of the "trust premises," by which I apprehend he means the lands. And he claims to be paid his costs of the suit.

The case was entered to be tried at the Belleville Sittings, but by arrangement it stood over to be heard in Toronto. When the trial came on in Toronto no counsel appeared for the defendant Ecklin, but Mr. Walkem, who appeared for the defendants the Synod, volunteered to present the case of the defendant Ecklin without prejudice to the position of his clients, the Synod. It had been before admitted that the plaintiff was, in the year 1876, licensed by the Bishop (by letter) to the Mission of Hillier and Wellington, and that this license had been (professedly) cancelled and revoked by the Bishop on the 4th day of October, 1882, and that the plaintiff officiated from the time of his appointment up to the time of the revocation of his license. The deed of revocation of the license was produced and put in evidence.

It had also been agreed that the printed books (Canons) of the Diocese, and, so far as necessary, of the Diocese of

Toronto, also the printed proceedings of the Synod of the Dioceses of Toronto and Ontario, and the printed Canons and proceedings of the Provincial Synod, should be received as if the originals had been proved so far as the originals would be evidence in the case. It had also been agreed that the Bishop's patent should be put in as evidence. Some correspondence was put in, and also a copy of certain parts of a report of the Commissioners appointed by the Bishop to inquire into the causes of the closing of two of the churches in which services had been performed by the plaintiff.

No parol evidence was given.

The question chiefly argued was whether or not the Bishop has the power to cancel the license of a clergyman who has been licensed, without proceedings being taken under the Canons of the Diocese, and acting on the finding of the commissioners appointed under the provisions of the Canons.

It was agreed (1) that if I should be of the opinion that the Bishop had not the power to cancel and annul the license of the Incumbent without a trial under the provisions of the Canons, and without cause, there having been no such trial, the plaintiff must succeed (2). If I should be of the opinion that the Bishop had the power so to do, but only for good cause, then that the trial of the question as to whether or not there existed such good cause was to be reserved; and (3). If I should be of the opinion that the Bishop had the absolute power so to do without cause, then the judgment should be against the plaintiff's contention.

At the trial it was conceded that if the case falls within the provisions of Canon No. 8 (page 56 of the printed Book of Canons), that is to say, if this Canon comprehended such a case as the present one, the plaintiff must succeed; but counsel contended that the case is not comprehended by the provisions of this Canon, and that according to ecclesiastical law the Bishop had the absolute and unqualified power to do as he professed to do in this instance, the plaintiff being, as was contended, not a Rector, but a Missionary Curate.

For the plaintiff it was contended that the case is comprehended in the provisions of this Canon No. 8, and that the Canon has direct application to it; and further, that even if the case did not fall within the provisions of the Canon, the Bishop, nevertheless, had not, under the ecclesiastical law, the power or authority contended for by the defence. A branch of this contention was, that inasmuch as there was property, and what might be considered a "living" in the parish or place in question, the plaintiff was in the position (in respect of the matters material to the case) of a beneficed clergyman, though counsel did not seem to consider this last necessary to sustain the contention.

The Act of Parliament under the authority of which this Canon was passed, is 19 & 20 Vic. ch. 141, an Act that was reserved for the signification of Her Majesty's pleasure on the 19th June, 1856, and assented to by proclamation on the 28th May, 1857. The preamble of this Act states that doubts existed as to whether or not the members of the United Church of England and Ireland had the power of regulating the affairs of their Church in matters relating to discipline, and necessary to order and good government, and that it was just that such doubts should be removed in order that they might be permitted to exercise the same rights of self-government as were enjoyed by other religious communities. And the first section of the Act is as follows :

"The Bishops, Clergy, and Laity, members of the United Church of England and Ireland, in this Province, may meet in their several Dioceses, which are now or may be hereafter constituted in this Province, and in such manner and by such proceedings as they shall adopt, frame constitutions and make regulations for enforcing discipline in the Church, for the appointment, deposition, deprivation, or removal of any person bearing office therein, of whatever order or degree, any rights of the Crown to the contrary notwithstanding, and for the convenient and orderly management of the property, affairs and interests of the Church in matters relating to, and affecting only,

the said Church and the officers and members thereof, and not in any manner interfering with the rights, privileges, or interests of other religious communities, or of any person or persons not being a member or members of the said United Church of England and Ireland: provided always, that such constitutions and regulations shall apply only to the Diocese or Dioceses adopting the same."

It was admitted that this Act is ample in its provisions, and contains authority sufficient for the passing of the Canon, even if the same were properly interpreted or construed as providing for a case such as the present one.

The first and second sections of this Canon No. 8 are as follows:

"1. There shall be a Court of this Diocese, erected by the Lord Bishop, and authorized by the Synod, called 'The Diocesan Court of Ontario,' for the prosecution, hearing, and trial of all ecclesiastical causes within this Diocese, and of all offences of the Laity, as well as the Clergy, against the laws ecclesiastical, against the provisions of the statutes constituting and affecting the Synod, and the canons, rules, and regulations of the Synod."

"2. That in every case of any Clerk in Holy Orders of the United Church of England and Ireland within this Diocese, who may be charged with any *crime* or *immorality*, with drunkenness, profane swearing, disorderly conduct, frequenting places most liable to be abused to licentiousness, with the discontinuing the exercise of the ministerial office without lawful excuse, or exercising any lay profession or occupation, unconnected with his sacred calling, without the sanction of the Bishop; with the habitual disuse, after notice from the Lord Bishop, of public worship, or of the Holy Eucharist, according to the offices of the Church; with the habitual infringement, after notice, of the rubrics of the Book of Common Prayer, or with schism, or separating himself from the communion of the Church; with heresy, or teaching or maintaining heretical doctrines, or with teaching or inculcating doctrines contrary to those of the Church, such teaching or maintaining being by way of writing, or

printing, or preaching, or public teaching, or circulating books containing such doctrines ; or with any violation of the provisions of the Statutes constituting the Synod, or of the Canons, Rules, and Regulations of the Synod; or concerning whom there may exist scandal or evil report, as having so offended ; it shall be lawful for the Bishop, on the application of the party complaining thereof, or if he shall think fit of his mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be an Archdeacon or Rural Dean within the Diocese, or in case of the absence or sickness of the Archdeacon, should there be only one Archdeacon of the Diocese, then any five clergymen whom the Bishop of the Diocese may appoint, for the purpose of making inquiry as to the grounds of such charge or report ; provided always that notice of the intention to issue such commission under the hand of the Bishop containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the Bishop to the party accused fourteen days at least before such commission shall issue : provided that no commission shall issue on the application of any party complaining until he shall have first given to the Bishop and his successors in office a bond, to be approved of by the Bishop, in the penal sum of \$200, to pay all costs and expenses that the party complained of may have incurred, in case he shall be acquitted of the complaint, or the complaint dismissed for want of due prosecution."

The sections that immediately follow provide, amongst other things, for the manner of proceeding by the Commissioners, their examination of witnesses upon oath or affirmation, and for the transmission by the Commissioners, or any three of them, to the Bishop under their hands and seals of the depositions of the witnesses taken before them, and a report of the opinion of a majority of the Commissioners present on the inquiry whether there is or is not sufficient *prima facie* ground for instituting proceedings against the party accused.

Section No. 6 provides, amongst other things, that if the Commissioners shall report that there is sufficient *prima facie* ground for instituting proceedings, and if the Bishop of the Diocese or party complaining shall thereupon think fit to proceed against the party accused, articles shall be drawn up by the direction of the Bishop, or at the instance of the party complaining, and, when approved and signed by a barrister-at-law, shall, together with a copy of the depositions taken by the Commissioners, be filed in the Registry of this Diocese; and for the inspection of the same without fee by any such party or any person on his behalf.

Section No. 7 provides for the service of the articles and the time after such service at which proceedings may be commenced.

Then follow sections providing for the trial, and in case of conviction the sentence of the party accused. The concluding paragraph of Section No. 11 is in these words:—
“That it shall be within the power of the Bishop, *ex-officio*, and not inconsistent or contrary to the said Canon, to admonish those offending, which admonition, for any offence mentioned in the second section of the said Canon not made a subject for judicial inquiry or presentment, shall be made in private: upon a second offence, it shall be public or private at the discretion of the Bishop, and made in such manner as to the Bishop may seem proper.”

The 13th Section provides for an appeal by any party who shall think himself aggrieved by the judgment, to the Court of Appeal of the Metropolitan.

The 16th Section limits the time for the commencement of a suit or proceedings against a Clerk in Holy Orders for any offence specified in the Canon or against the provisions of the statute constituting the Synod, or against the canons, rules, and regulations of the Synod, to two years after the commission of the offence.

By the 11th Section it appears that the sentence may extend to *admonition* or *suspension* or to *deposition* or *deprivation* as provided for in the Statutes *enabling* the members of the United Church of England and Ireland to meet in Synod.

The deed which professes to make void the license to the plaintiff is as follows :

“To the Rev. John Halliwell,

“We, John Travis, by Divine Permission Bishop of the Diocese of Ontario, for divers good causes, do by virtue of our authority ordinary and episcopal revoke, annul, and make void our License to you to perform Ecclesiastical duties as a Missionary Priest of the Church of England in the Mission of Hillier within our Diocese and jurisdiction. And We do further by these Presents prohibit you from officiating as Minister, or performing any Ecclesiastical duties within the said Mission.

“Given under our hand and seal, this fourth day of October, 1882, and in the 21st year of our Consecration.

“J. T. ONTARIO.” [Seal.]

This does not specify any particular charge against the plaintiff. I cannot say that the report that I before alluded to can be considered as proper evidence in this case. It was, however, used more or less by both counsel on the argument, and it was (at least partly) for this reason that it was received, and I think that under the circumstances I am at liberty to look at it for the purpose of obtaining some light as to the cause or causes of the trouble that gave rise to the present litigation. I will, however, refer to it very briefly. The Commissioners seem to have taken evidence on the inquiry as to the reasons that caused the unhappy estrangement between the plaintiff and his parishioners, and as to whether their antipathy to him was well or ill founded, and as to whether or not it could be removed. And they say that the estrangement was caused primarily by a strong and generally felt conviction on the part of the parishioners that the plaintiff was painfully wanting in veracity. In the conclusion of their report they however say that if the Bishop pressed for a distinct and specific answer to the question, whether there be sufficient *prima facie* ground for instituting further proceedings against the plaintiff, as provided for by Canon No. 8 they would feel bound to answer in the affirmative.

Nevertheless they were of the opinion that without the production of other and much stronger evidence than that adduced the institution of further proceedings would not result in a charge of breach of discipline under the said Canon being sustained.

This report bears date the 26th May, 1882, and it appears, and was so stated at the Bar, that it was under these circumstances that the Bishop acted when he executed the deed above set forth.

The first question to be considered is as to whether or not the provisions of the Canon are sufficiently comprehensive to embrace the case. If this be decided as the plaintiff contends that it should be, it will not be necessary to determine the other questions that were argued.

The words "crime or immorality," that occur in the early part of the second section of the canon, seem to me to have (according to their natural and grammatical sense) a very comprehensive meaning. In argument, counsel for the defence admitted that if the word "immorality" were given its natural and grammatical meaning, it would embrace the present case. It is to me difficult to perceive any limit to the meaning of these two words if taken in their ordinary sense. The chief contention as to the words employed in this second section was about the word "immorality," and dictionaries were resorted to.

In the Imperial Dictionary this word is thus defined: "Any act or practice which contravenes the Divine commands or the social duties. Injustice, dishonesty, fraud, slander, profaneness, gaming, intemperance, lewdness, are *immoralities*. All crimes are *immoralities*; but *crime* expresses more than *immorality*." And the word "immoral" is thus defined: "Inconsistent with moral rectitude; contrary to the moral or divine law; wicked; unjust; dishonest; vicious. Every action is *immoral* which contravenes any divine precept, or which is contrary to the duties which men owe to each other.—2. Wicked or unjust in practice; vicious; dishonest; as, an *immoral* man. Every man who violates a divine law or a social duty, is *immoral*, but we

particularly apply the term to a person who habitually violates the laws."

I am quite at a loss to perceive any limits to the grammatical signification of the words "crime or immorality," used in the Canon.

Counsel for the defence contended, however, that the word "immorality" is not to be understood according to its grammatical meaning, but that its meaning in the section is controlled by the specific words that follow; and that it means only an immorality or immoralities of a like kind with those that are specified. In *Maxwell on Statutes*, at p. 413, where the author is treating of this principle of construction, he says: "Further, the general principle in question applies only where the specific words are all of the same nature. Where they are of different genera, the meaning of the general word remains unaffected by its connexion with them." The author refers to many, though not a great many authorities, which seem to me to bear out his statement of the law. Sometimes also the general object of the Act requires that the meaning should not be restricted. See *Regina v. Edmundson*, 2 Ell. & Ell. 77; *Doggett v. Catterns*, 17 C. B. N. S. 669, and 19 C. B. N. 765.

Now applying the rule thus stated in Maxwell to the present case, it seems to me impossible to say that the meaning of the word "immorality" in the second section of this Canon is, at all restricted by the specific words that follow it, for they are certainly not of the same nature, but of very different *genera*, and I think that this word has, in this section, its natural and grammatical meaning.

The revocation of the plaintiff's license, if a valid revocation, would, as I understand the matter, and as was stated and admitted at the bar, have the effect of a deposition and deprivation. It would, in effect, operate as a disqualification of the plaintiff. He would no longer be a member of the Synod, for the first article of the constitution provides "That the Synod shall consist of the Lord Bishop of the Diocese, and any co-adjutor or assistant Bishop thereof, of

the Priests and Deacons of the same licensed by the Lord Bishop, of those Clergymen of the Diocese in good standing in the Diocese who have become superannuated or incapacitated in consequence of infirmity, and of Lay Representatives to be elected as provided;" and the plaintiff would not, in such case be any one of these. By the eleventh section of the Canon the sentences of the Diocesan Court may extend to admonition, suspension, deposition or deprivation. It appears to me that the offences mentioned in the Canon embrace all offences with which a Clerk in Holy Orders can be charged, and that by force of the first section of the same Canon, one who is charged with an offence has the right to be tried before the Diocesan Court, and if he thinks himself aggrieved by the judgment, he has by the thirteenth section the right to appeal from it to the Court of Appeal of the Metropolitan. Otherwise, the Canon, or at least these parts of the Canon, would have no operation except at the will of the Lord Bishop, for he could in any such case simply revoke the license, and the same consequences would follow as upon a conviction and sentence by the Court, which I think it is very clear could not have been the intention when the Canon was passed, and I think the Canon, on its face, says and means the contrary. Then, if one who is charged with an offence, nay, one who is really guilty of an offence, is entitled to a trial by the Diocesan Court, before conviction and sentence, can it be successfully contended that a Clerk in Holy Orders who has neither offended nor been charged with an offence is in a less favorable position, and liable to have his license revoked, and to suffer all the consequences at the mere will of the Lord Bishop, and without any trial, or even a statement of the reason why the act is done? This, I think, could not have been intended,

When, however, the whole scope of the Canon is taken into consideration, and particularly the provisions of the first, second, the concluding part of the eleventh and the twelfth sections, I think it appears that the Lord Bishop has not the powers contended for by the defence, and that

a fractional part, though a small part, of the jurisdiction (so to speak) is assigned to him—that part particularly which is mentioned in the concluding paragraph of the eleventh section; and that the other part—the larger fractional part—is assigned to the Diocesan Court; and that no matter what may have been the powers in this respect of the Bishop before the passing of the Canon, they were by the Canon limited to those that it assigned to him; and I am of the opinion that the Bishop had not the power to cancel and annul the license of the plaintiff either without or for cause without a trial by the Diocesan Court, to which I think the plaintiff was entitled. I think the judgment must be for the plaintiff.

It seems difficult to dispose of the costs of the litigation in a manner that will not operate a hardship on some one of the parties.

The plaintiff is, I think, entitled to be paid his costs by the defendant Ecklin.

The defendants, the Synod, are entitled, I think, to retain their costs out of any interest or income of the fund or property that may be in their hands, if there be so much in their hands, and if not, then to an order against the defendant Ecklin for the payment of the balance or deficiency; and the plaintiff is entitled to an order against the defendant Ecklin for the payment of such sum, if anything, as may be deducted or taken by the Synod from the interest or income in their hands in satisfaction or part satisfaction of their costs.

The judgment will be for the plaintiff, and the costs disposed of as above. The proper order will be settled, for, owing to the disposition made of the costs, it cannot be exactly as the plaintiff has asked it.

G. A. B.

[QUEEN'S BENCH DIVISION]

REGINA v. YOUNG.

Liquor license Act—Conviction by two magistrates—Onus of proving license—Imprisonment in default of distress—Selling liquor to Indian.

A conviction under R. S. O. ch. 181, for selling liquor without a license, purporting to be made by three magistrates, but signed by two only, was returned with a *certiorari*.

Held, if an objection at all, a ground for sending back the writ, that the third magistrate might sign the conviction, but not a ground for quashing it.

By R. S. O. ch. 181, sec. 85, where the act or omission complained of is one for which, if the defendant were not duly licensed, he would be liable to a penalty under the Act, the burden of proving that he is licensed is on the defendant.

Held, no objection to a conviction that it did not show defendant was not licensed.

A penalty of 30 days imprisonment in default of sufficient distress for the fine was imposed.

Held, good under sections 51 and 59 of the Act.

The offence was selling liquor to an Indian.

Held, no objection to a conviction under R. S. O. ch. 181, for if so the defendant was guilty of two offences, one under the latter Act, and one under the Indian Act.

THIS was a motion, on 31st October, by *Beck*, for an order *nisi* to quash a conviction for selling liquor without the license required by law, on the grounds set out in the judgment, in which also the authorities cited are referred to.

October 31st, 1884. OSLER. J. A.—On the objections taken the motion is refused.

1. The conviction purports to be made by three, and is signed by two Justices only.

This, if an objection at all, is a ground for sending back the writ of *certiorari* in order that the third magistrate may sign the conviction. Either no conviction at all has been yet returned, and so the motion is premature, or there is a good one as regards this particular objection, because such a conviction is properly made by two Justices. I am inclined to think there is nothing in the objection: *Regina v. Smith*, 46 U. C. R. 442.

2. The conviction does not shew the defendant is not licensed.

The offence charged is one for which the defendant is liable to a penalty if not licensed, and sections 84

and 85 of the Act, R. S. O. ch. 181, shew that it rested on him to prove that he was licensed and did the act lawfully, a sale having been proved.

3. That a penalty of thirty days imprisonment, in default of sufficient distress, is *ultra vires* the magistrates.

The case comes under secs. 51 and 59, not under sec. 43, as a case in which the recovery of the penalty is not otherwise provided for than by sec. 59, and so the imprisonment in default of sufficient distress is lawful. *Regina v. Rodwell*, 5 O. R. 186, is a case under secs. 43 and 52 for selling during prohibited hours, and does not apply here.

4. The offence was selling liquor to an Indian, and defendant should therefore have been proceeded against under the Indian Act of 1880.

There is nothing in the evidence returned with the *certiorari* to shew that the sale was to an Indian, but even if it was, I see no reason for thinking that the defendant might not be liable to a penalty under both Acts. *Regina v. Prittie*, 42 U. C. R. 612, has no application. That case turned upon this, that the Liquor License Act could not be in force in a locality where the Temperance (Dunkin) Act was in force, so as to subject the defendant to a penalty under both Acts for doing the same thing. Here he has been guilty of two offences: 1st. Of selling without a license; 2nd, of selling liquor to an Indian.

5. No evidence to shew the locality of the offence, *i. e.*, that it was committed within the jurisdiction of the magistrates.

There is evidence on which the magistrates were justified in acting. The information and charge is for selling liquor in the village of Caledonia, which I can judicially notice is in the County of Haldimand (*Regina v. Shaw*, 23 U. C. R. 616; R. S. O. ch. 5, page 20); and Silversmith, the person to whom the liquor was sold, says he bought it "at the defendant's hotel in Caledonia," from the defendant himself. It appears, moreover, on the evidence, as returned by the magistrates, that the defendant admitted on the trial (as he was competent to do) that the

liquor was consumed on the premises on the day named in the information.

I cannot try on affidavit the question whether this admission was actually made. If it is a false statement the defendant may have a remedy against the magistrates, but on this proceeding I must take it as verity.

The motion is therefore refused.

Motion refused.

[QUEEN'S BENCH DIVISION.]

BROWN V. NELSON.

Statute of Frauds—Contract not to be performed within a year—Part performance—Rescission.

The plaintiff agreed to purchase from the defendant 76 shares of stock in the Globe Printing Company, and gave to the defendant his note, payable in two years, for the price of the shares, which were transferred to him. At the defendant's request he then pledged these 76 shares, and, as the jury found, lent the defendant 44 other shares of his own, to pledge to a bank, which discounted the note for the defendant.

The jury also found that it was a condition of the purchase that the defendant, who had a large interest in the Globe Printing Co., should keep the plaintiff in the position which he occupied as managing director of the Globe Printing Co., at a fixed salary. The defendant at the maturity of the note retired it, and took an assignment to himself of the 120 shares.

The plaintiff having been afterwards dismissed from his position as managing director, brought this action for a return of the 44 shares, on the ground that the purpose for which they had been pledged, (viz.: the raising of money by the defendant for Hon. George Brown's estate,) had been fulfilled; and for a return of the note, and to be relieved from the purchase of the 76 shares, on the ground that the condition of the purchase, (viz.: his being retained in office,) had not been fulfilled, but had been broken by the defendant's procuring his dismissal.

Held, that as there had been a partial performance of the defendant's agreement, by retaining the plaintiff in office for the period within which the 76 shares were to have been paid for, there could be no rescission of the whole contract; but that the plaintiff—the finding of the jury as to the 44 shares not having been moved against—was entitled to a return of these shares, and the defendant to judgment for the price of the 76 shares; and that the plaintiff's remedy, if any, for wrongful dismissal was by an independent action.

Held, also, that the defendant having performed his portion of the agreement, the Statute of Frauds, as regards agreements not to be performed within a year, was not applicable to the undertaking to keep the plaintiff in office.

THE plaintiff (Clerk of the Surrogate Court of the county of York), sued the defendant, a publisher residing in Edinburgh, Scotland, for a return of 44 shares of stock in the Globe Printing Co., lent by the plaintiff to the defendant under the circumstances set forth in the statement of claim; and also for rescission of a contract made between the parties for the purchase by the plaintiff from the defendant of 76 other shares of Globe stock, at the par value thereof, \$38,000: and for a return of the promissory note given by plaintiff to defendant for the purchase money of said shares.

The statement of claim alleged that the defendant, being a brother-in-law of the late Hon. George Brown, had, shortly after that gentleman's death, come out to Canada to superintend the winding-up of Mr. Brown's estate, a great part of which consisted of shares in the stock of the Globe Printing Co.; that he had induced the plaintiff to purchase 76 shares of this stock at par, by promising that the defendant should be kept in the office of editor-in-chief and managing director of the *Globe* newspaper, and that his salary in that office should be increased from \$4,000 to \$5,000 per annum to enable him to pay for this stock; that the plaintiff, relying on the promise of the defendant (who then owned a controlling interest in the stock of the company), had purchased this stock and given the defendant his promissory note at two years therefor; and, in order to enable the defendant to discount the note so as to raise money for the purpose of paying off liabilities of the Brown estate, had voluntarily pledged the said 76 shares, and also 44 other shares of his own to the Bank of Montreal as collateral to the note; that the money had been advanced to the defendant for the said purpose, and that at the expiration of the two years the defendant, having retired the note, had obtained an assignment from the bank of the whole 120 shares, and now refused to return to the plaintiff his (the plaintiff's) 44 shares: that afterwards the defendant had caused the plaintiff to be dismissed from the office of editor-in-chief

of the "Globe" newspaper, and managing director of the Globe Printing Co., and had thus deprived the plaintiff of the means of paying for the 76 shares so purchased by him. And the plaintiff claimed a return of the 44 shares, and rescission of the contract for purchase of the remaining 76 shares.

The statement of defence admitted the contract for the sale and purchase of the 76 shares at the price stated, but denied the alleged promise by the defendant to keep the plaintiff in office, or to increase his salary; and that the plaintiff's dismissal had been procured by the defendant; and the defendant also counter-claimed for the amount of the note for \$38,000 and interest, given by the plaintiff in payment for the 76 shares. The defendant also claimed that the 44 shares had been pledged to him as security for the payment of said note, and to hold the same until the note should be paid.

The action was tried at the Toronto Winter Assizes, 1884, before Rose, J., and a special jury. At its close, the learned Judge submitted five questions to the jury, which they answered as follows:—

"1. Did the plaintiff purchase the 76 shares for the defendant conditionally or unconditionally? A. The 76 shares were purchased conditionally.

"2. If conditionally, what was the condition? A. Mr. Gordon Brown's being appointed managing director at a salary of \$5,000 per annum.

"3. Did the defendant, as a condition of the purchase, agree to keep the plaintiff in his position as managing director of the Globe Printing Co.? A. Yes.

"4. Did the plaintiff transfer the 44 shares to the Bank of Montreal as collateral security for payment of the \$38,000 note; or were they transferred to enable the defendant to raise money for the purposes of the Brown estate? A. The 44 shares were transferred to enable the defendant to raise money for the purpose of the estate.

"5. Did the defendant procure the dismissal of the plaintiff, or was he instrumental in procuring said dismissal? A. Yes; he was instrumental, through his agent, Mr. MacLennan."

The motion for judgment having been argued, the following judgment thereon was given by

ROSE, J.—“This is an action tried before me and a special jury at the Toronto Sittings on February 20th, last. On the 22nd February the plaintiff and defendant both moved before me for judgment.

Both parties from the beginning disregarded the pleadings. I shall therefore not refer to them, but endeavour to state the plaintiff's claim from the findings of the jury, which he (the plaintiff) adopts, and his own evidence, and consider as to whether the claim has any evidence to support it, or whether on the evidence and the law it is entitled to prevail.

It was contended by Mr. Robinson, and I accede to his contention, that (having regard to the argument of counsel), judgment should be given upon the undisputed facts in evidence, and the findings of the jury as to the disputed facts. I must disregard the findings of the jury if there be no evidence in fact to sustain them, or if, notwithstanding the findings of fact, the plaintiff is not entitled to succeed on the law, or, as it was put, notwithstanding the findings, the defendant is entitled on the whole case to move practically for a non-suit. The following authorities were cited and may be referred to: O. J. A., secs. 22, 28; *Wilson's Judicature Act* (3rd ed.), 327, notes to Order XXXVI., Rule 22a; O. J. A. Rule 470, 273, 315, and notes; *Benschor v. Coley*, 52 L. J., 398; (in reading the last cited case, attention is called to the fact that the English Act contains no equivalent for sub-sec. 2 of sec. 28 O. J. A.); *Hamilton v. Johnson*, 5 Q. B. D. 263.

The claim of the plaintiff is substantially that he purchased from the defendant seventy-six shares of the Globe Printing Company stock for the price or sum of \$38,000: that the purchase was conditional, the condition being that he should be managing director of the company at a salary of \$5,000 per annum, and on the further condition that the defendant should keep him in office for an indefinite period (no date being mentioned), to enable him to pay off interest and principal: that the defendant was instrumental in procuring the dismissal of the plaintiff from his said position, whereby the plaintiff is entitled to be relieved from his purchase and the payment of the \$38,000, and to have the note he gave to the defendant to represent the price of the stock delivered up to be

cancelled ; also, that the plaintiff transferred to the Bank of Montreal forty-four shares of the said stock belonging to plaintiff, and the said seventy-six shares, in all 120 shares, at the defendant's request, to enable the defendant to borrow money from the bank for the purposes of the estate of the late Hon. George Brown: that the defendant has paid off the loan, and thus, the purpose for which the stock was transferred having been accomplished, the plaintiff is entitled to have the shares re-transferred.

The defendant, on the other hand, claims that the sale of the seventy-six shares was unconditional: that the seventy-six shares and the forty-four shares were transferred as collateral security for the payment of the note for \$38,000, the purchase money of the seventy-six shares: that the time for payment has expired, and the amount remains unpaid: that the note, which was given for the purchase money is in the hands of the defendant overdue and dishonoured, and that the defendant is entitled to judgment against the plaintiff for the sum of \$38,000 and interest.

These I understand to be the claim and counter-claim. I will now proceed to consider the defendant's answer on the law and evidence to the plaintiff's claim; and that we may have the questions left to the jury and answers thereto more clearly in mind, we will state the findings, inter-reading the answers with the questions, as follows:

1. Did the plaintiff, Mr. Gordon Brown, purchase the 76 shares, representing \$38,000, from the defendant Nelson unconditionally or conditionally? The 76 shares were purchased conditionally.

2. If conditionally, what was the condition? The condition was Mr. Gordon Brown's being appointed managing director at a salary of \$5,000 per annum.

3. Did the defendant, as a condition of purchase, agree to keep the plaintiff in his position as managing director of the Globe Company? Yes.

4. Did the plaintiff transfer the 44 shares, representing \$22,000, to the Bank of Montreal as collateral security for the payment of the \$38,000 note, or was it transferred to enable the defendant to raise money for the purposes of the estate? The 44 shares were transferred to enable the defendant to raise money for the purposes of the estate.

5. Did the defendant procure the dismissal of the plaintiff, or was he instrumental in procuring said dismissal? Yes, he was instrumental through his agent, Mr. Maclellan.

I do not find it anywhere stated by the defendant on what terms the seventy-six shares were transferred to the bank, but as plaintiff says it was an out and out purchase, and that he was entitled to delivery of the shares, perhaps it must be assumed he meant to say that they were transferred on the same terms as the forty-four shares, *i.e.*, to enable defendant to raise money for the purposes of the estate. The defendant contends that the effect of the evidence and findings is that if the plaintiff is to purchase the seventy-six shares and the defendant is to keep him in his position there has been a partial performance, and hence there can be no rescission, but the plaintiff's remedy, if any, is for breach of contract; but that the breach by defendant is no answer to his claim for payment of purchase money; and he calls attention to the fact that for the two years the plaintiff kept the stock and for same period was kept in office.

On this point were cited: *Port Whithy and Port Perry R. W. Co. v. Dumble*, 32 U. C. R. 36; *S. C. 22 C. P. 39*; *Pollock on Contracts*, 3ed ed. 553-5; *Benjamin on Sales*, (4th Am. ed.) 621-2; *Carter v. Scargill*, L. R. 10 Q. B. 564; *Hunt v. Silk*, 5 East, at p. 449. To this plaintiff answers, that the shares are now vested in defendant: that whether the condition can be relied upon is dependent upon who is pursuing; and that the agreement is a dependent one: *Cutter v. Powell*, 2 Sm. L. C. 1; *Pordage v. Cole*, 1 Wms. Saund. 548; *Hulle v. Heightman*, 2 East 145; *Campbell on Sales*, 275; *Withers v. Reynolds*, 2 B. & Ad. 882.

2. The defendant further says no time was specified during which the defendant was to keep plaintiff in office. The note was payable in two years. There was no agreement to renew. If the note was to be paid when due, the term of office must either have been for life or indefinite. The effect of plaintiff's conduct and contention must be, 'I may break my contract in not paying for stock within two years, but you must keep me in office after the two years, although I have not paid for my stock as agreed.'

The plaintiff answered: 'The defendant cannot raise the question as to duration of time, as he put an end to the employment': *Atkinson v. Smith*, 14 M. & W. 695; *Lovelock v. Franklyn*, 8 Q. B. 371; *Bankart v. Bowers*, L. R. 1 C. P. 484; *Midland R. W. Co. v. Ontario Rolling Mills Co.*, 2 O. R. 1.

3. The defendant objected that the contract as to service set up was one not to be performed within a year, and

hence not enforceable under the 4th section of the Statute of Frauds: *McLean v. Dun*, 1 A. R. 153; *Browne on Statute of Frauds*, 129, 130, secs. 114, 115, 116. If it is one to be performed within a year then it has been performed.

The plaintiff answered as to this, that the performance by entry on service &c., took the case out of the Statute: *Lumsden v. Davis*, 46 U. C. R. 1: that plaintiff could have at his option performed the contract within a year: *Cole v. Campbell*, 9 P. R. 498.

4. The defendant further objected that the plaintiff changed the tenure of his office by agreeing as a director to the passage of by-laws which made his tenure of office dependent upon his remaining a director, and placed the appointment in the hands of the directors, of which board the plaintiff was not a member.

5. That the condition upon which the stock was transferred to the bank by the plaintiff appears in the document of transfer, and cannot be contradicted by the defendant: *Dominion Bank v. Blair*, 30 C. P. 591; *Merchants Bank v. Moffatt*, 5 O. R. 122; *Northwood v. Keating*, 18 Gr. 643.

6. No evidence of dismissal by defendant.

7. The relief plaintiff asks for is equitable, and if he is entitled to it, *i. e.*, to have the 44 shares returned, it must be on condition of paying the \$38,000, if it is found that he is liable for the same.

After carefully perusing and re-perusing the evidence, the most able arguments offered before me, and all the authorities cited, and many more referred to in the cases cited, it appears to me the statement of the contract may fairly be put thus, according to the plaintiff's evidence and the findings of the jury: The plaintiff is on his part to pay \$38,000, and to give his note therefor payable in two years, with interest at five per cent. per annum, with no agreement to renew. The defendant is to transfer to plaintiff absolutely, seventy-six shares of stock—par value \$38,000—the transfer and giving of the note to be contemporaneous transactions; also to retain or cause to be retained the plaintiff as managing director of the "Globe"; also to agree to keep or cause to be kept the plaintiff in such management for an indefinite—say reasonable—time, to enable the plaintiff to pay the interest and ultimately the principal of the note.

We will reverse the position of the parties on the record and consider the defendant as plaintiff claiming payment

of the \$38,000, purchase money for the seventy-six shares, the two years having expired. The answer made is: 'The promise to pay was given in consideration of your promise to transfer stock. A. That has been done, was done on the day the note was made, *i. e.*, 24th August, 1880, and the property that day vested in you. Also of my being retained as managing director of the "Globe." A. That has also been done. And on the further condition of your agreeing to keep me or cause me to be kept in such position for a reasonable time, to enable me to pay the interest and ultimately the principal.' Answer: 'You obtained my agreement. You were retained in office for a period beyond the period when the purchase money and the note given therefor became due. I gave you no agreement to renew the note. I claim payment of the \$38,000. If I have broken my agreement to keep you in office you have your redress in an action for damages.'

If that is a fair statement of contract and claim under it, is the case arguable? Mr. Brown claims that the payment on his part is to be conditional on Mr. Nelson's keeping him in office until he is ready to pay. Pay what? The purchase money? But the time for payment was two years, and the note was for two years, and not renewable. If payable in two years, then there is no breach, unless he was to be kept in office after the note was paid, which is not alleged. Let us refer to Mr. Brown's evidence:

'I understood it was to be paid in two years.' Again: 'Q. How did you know you were to get two years to pay it?' 'A. I know I was to get that. There were six people concerned in the matter. How can I tell who I made it with? I cannot say who I made the bargain with to get two years for payment, but I swear I did make the bargain.' Q. 'Was there any bargain, verbal or written, between you and him at the time you gave this note it should be renewed?' A. 'No.' Then again see letter of August 24th, 1882, from plaintiff to defendant: 'I was sorry to learn from Mr. MacLennan that you did not think well to aid in a renewal of the Globe Printing Co.'s syndicate * * * I hold, as you may remember, \$38,000 of stock in the syndicate, and I pledged \$22,000 of my own. I cannot pay the \$38,000. Misled by poor George's assurances I built an expensive house, and when he died was forced to sell it at a great loss to pay my debts. I have no means save my Globe stock to pay with, and Globe stock is just unsaleable in large amounts.' He then refers to the financial condi-

tion of the company, and his working hard, &c., and adds: 'Under these circumstances, I ask you to *make an exception of my stock and aid me to carry it* at a moderate rate on interest for two years more. I shall be able to pay the interest from my salary, and will bring the stock to par or die in the work. My wife, I may say, is anxious for me to get an easier occupation; and some of the politicians would gladly shelve me, to use the "Globe" for party purposes, regardless of a dividend. But I shall stick to the ship if you will help me to carry out the scheme into which we entered together two years ago. I am sorry to be compelled to ask you, who have already done so much for the "Globe," but I have no other resource.'

These extracts will repay the most careful analysis.

The first sentence is a reference to a syndicate, among whom Mr. Brown by his letter places himself. By reference to the syndicate agreement put in evidence it will be seen that the bank is to 'advance the whole amount required, (viz., \$379,000,) for two years, upon the security of the stock and the personal guarantee of the members of the syndicate as collateral.' It is true Mr. Brown says this is not the document drawn up by him. Probably it is a more formal document drawn up by a solicitor from his memorandum; but the terms of arrangement with the bank were substantially as set forth in the agreement above extracted. Mr. Brown claims no different or exceptional position: 'I hold, as you may remember, \$38,000 in the syndicate; and hence your refusal to aid in a renewal affects me as well as them.'

'As you may remember.' This language would seem natural if addressed to one who in the mind of the writer would not have the matter clearly before his mind as a separate and distinct transaction; but is it likely that a man, irritated as plaintiff would naturally be at a breach of an agreement such as is alleged, the result of which breach means financial ruin, would thus write? One would have expected language similar to this: 'As you well know, I purchased the stock on the strength of your promise to carry it until, from my salary, which you increased for that purpose, I could pay interest and principal; for' he continues, 'I cannot pay the \$38,000,' and gives as a reason, not that he has not been long enough in his position with the increased salary, but that he had in his brother's lifetime been induced to build a too expensive house, &c. He adds: 'I have no means excepting Globe stock.' No

reference to salary as a source out of which to pay. Then follow the words: 'I ask you to make an exception of my stock, and aid me to carry it at a moderate rate on interest for two years more.' Surely, with his forcible language, 'but I swear I did make the bargain,' *i. e.*, for two years; with his statement that there was no bargain to renew; with his request to have his case made an exception, and for aid to carry it for two years more; apart from the defendant's sworn statement,—is there any possible conclusion from the evidence for the plaintiff but that the \$38,000 were payable—to be paid—at the end of the two years? If so, then on the due date of the note the right of action upon it was complete, and to an action on it at that date no defence could have been pleaded, because the stock had been transferred, and the plaintiff was then managing director of the "Globe." It may be said that the plaintiff did not in that letter wish to threaten or use strong language to the defendant. Further examination of the letter leads to the conclusion that he was willing, in order to induce him to accede to his request, not only to hold out promises, but also to threaten. 'If you aid me, I will bring up the stock to par, or die in the work. My wife wishes me to get an easier occupation. Politicians would gladly shelve me, but if you will help me I will stick to the ship. If you will not, my wife's entreaties and the temptation of the wily politician may induce me to leave the ship to its fate, and the stock may never be brought to par.' To one who hesitated not to use such arguments, language quite as forcible and arguments quite as convincing would have readily suggested themselves had he been claiming a right. The final sentence I interpret thus: 'I have no right to demand—I regret being compelled to entreat one who has done so much already, but I have no other resource.' Then again, if the defendant was fully apprised of the plaintiff's financial position, and his inability to pay except from an income increased for that purpose, would it be natural to write so fully explaining the financial position?

The consideration of the case so far has incidentally involved the consideration of the principles on which mutual agreements are to be considered as either dependent or independent, and also the right to rescind for failure of consideration.

The law on the first point may be gathered from a number of cases which we will consider in their chronological order. The first case of *Boone v. Eyre*, (17 Geo. III.,) found

in a note to *Duke of St Albans v. Shore*, 1 H. Bl. 273, contains the following rule laid down by Lord Mansfield, and found running through the subsequent cases, viz.: 'Where mutual covenants go to the whole consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent.' To apply the rule to the case before us. The consideration for the payment of the money is threefold: 1st, and chiefly, the stock. 2nd, The retention in office. 3rd, The agreement to keep in office, &c. The agreement to retain in office, it is clear, does not go to the whole consideration on the part of the plaintiff, *i. e.*, to the whole \$38,000.

This was followed by *Campbell v. Jones*, 6 T. R. 570. (36 Geo. III.) where Lord Kenyon, C. J., rests his decision on two grounds, in support of the second of which he cites *Boone v. Eyre*, and states the ground thus: 'But another ground on which the plaintiff is entitled to judgment is this, that the teaching of the defendant is not the whole consideration of the covenant to pay.' See also *Taylor v. Hare*, 1 N. R. 260. Both are cited in *Ritchie v. Atkinson*, 10 East, 295 (49 Geo. III.)

Ellen v. Topp, 6 Ex. 424 (1851) refers to these and other subsequent cases. The rule, according to that case, that where one covenant forms only part of the cause or consideration for another, both will be independent, would seem to apply only where the rest of the consideration is or has been executed, and to have no application where nothing has been done under it by the plaintiff, and the whole is executory. In the case before us, the rest of the consideration, *i. e.*, the transfer of the stock and appointment as managing director, had been executed.

The rule to be extracted from *Graves v. Legg*, 9 Ex. 709. (1854), is the same as that stated above, with this addition. that the character which the covenants possess in the first instance cannot be changed by a subsequent partial performance, although the defendant may be estopped by accepting it from relying on the failure to perform the whole as a defence.

In *White v. Beeton*, 7 H. & N. p. 55 (1861) Bramwell, B., states one of his conclusions as follows: 'First, that inasmuch as the plaintiff was to deliver the securities to the defendant at one time, and at another time to get the con-

sent of the two shareholders to the vesting of their shares in the defendant, the performance of the latter act is not a condition precedent to the plaintiff's right to recover in the action, but the non-performance of that act is the subject of a cross-action.'

See also *Carter v. Scargill*, L. R. 10 Q. B. 564; *Hunt v. Silk*, 5 East. 449; *Benjamin on Sales*, 4 Am. ed. 621-2; *Pollock on Contracts* 3rd ed. 553-5; *Port Whitby and Port Perry R. W. Co. v. Dumble*, 33 U. C. R. 36; S. C. 22 C. P. 39; *Utter v. Powell*, Sm. L. C. vol. ii. p. 1; *Pordage v. Cole*, 1 Wm. Saunders, 548; *Hulle v. Heightman*, 2 East 150; *Campbell on Sales*, 275; *Withers v. Reynolds*, 2 B. & Ad. 882.

If the principle of dependent or independent agreements applies, I do not see how it can assist the plaintiff. I confess, however, to experiencing great difficulty in applying to the facts here the rules we have endeavoured to extract from the cases. It seems to me that if there was a promise to pay within the two years, then there is no breach of condition, as the plaintiff was in office for the two years, and I do not see how it can be argued that the promise to continue in office was a promise for a longer term than that appointed for payment. If, however, the agreement was as contended for by the plaintiff (but it seems to me without any evidence to support it), that the plaintiff was to have as long time as he required to pay the \$38,000, and was to be kept in office until he was able to obtain funds for such payment, then the time for such payment has not arrived.

As to rescission. If I am correct in finding that the \$38,000 was payable in two years from 24th August, 1880, there has been no failure of consideration, and hence there can be no rescission. If, on the other hand, the money was not payable in two years, it must have been payable practically at the will of the plaintiff, or in any event not until out of his increased salary he would be able to pay it. As to money payable at will of payee, see cases collected in *Macdonald v. Murray*, 2 O. R. 579, 581.

If such were the agreement (and I again say I know of no evidence to support it), the defendant has by his own act made the time for payment impossible, and as he has the stock back again, and has received the interest for about two years, and also by retaining the stock will have the benefit of the 8 per cent earnings, if such there were, and as the plaintiff's services may be assumed to be worth the

\$4000, as that was the sum he was getting before the increase—it may be that the plaintiff would be entitled to rescission. See *Kerr on Frauds*, 2nd ed. 371, as to right to rescission, notwithstanding inability to rescind transaction as a whole, where such inability is attributable to the party against whom relief is sought. On this I express no opinion and have formed none.

I have not considered the further points raised. Mr. Osler urged that the defendant shewed no title to the note by reason of the endorsement not being by the bank, but by the manager, and cited *Bank of Upper Canada v. Ruttan*, 22 U. C. R. 451; *Madden v. Cox*, 44 U. C. R. 542. Mr. Robinson, in reply, cited *Morse on Banking*, (2nd ed.) 164.

I should not allow this objection to prevail, and if necessary would allow any imperfection in the mode of indorsement to be rectified. I do not think it material. The plaintiff owes the defendant the \$38,000, the consideration for the stock. The note was given to the bank at the defendant's request and for his convenience. It was not discounted for some time and the advance was made, not to plaintiff, but to defendant, who, as between himself and the bank, had to retire it, and at time of action it was in defendant's hands. It is not outstanding and cannot therefore be treated as payment, and the defendant may, I think, recover on the original consideration.

It follows, as the result of my opinion, that the defendant is entitled to payment of the \$38,000, with interest from the expiration of the two years: that the forty-four shares which, according to the finding, were lent to the defendant (and I think also the 76 shares) are the property of the plaintiff, and he is entitled to their possession. The findings of the jury as to the transfer of the forty-four shares seem to proceed upon the theory of an agreement with the defendant perfectly irrespective of the transfer to the bank, and that the transfer to the bank was in such form as the defendant desired, the defendant executing all papers as requested by Mr. MacLennan without regard to form or effect.

If the parties desire to speak to me as to the terms of the order to be made, so as to work out the judgment in such manner as to save expense in realizing the \$38,000 by sale of the stock, &c., I shall be glad to hear them.

The plaintiff has substantially failed and I see no ground for withholding costs from the defendant."

The plaintiff, on May 20th, 1884, gave notice to the defendant of the intention of the plaintiff to move the Divisional Court on the 26th of that month, by way of appeal from the judgment of the learned Judge who tried the cause, to set aside the judgment entered for the defendant upon the findings of the jury, and to enter a verdict for the plaintiff upon the said findings, on the ground that the said judgment was wrong as entered for the defendant on the said answers of the jury, as the learned Judge should have held that, the jury having found a conditional transfer of the 44 shares to enable the defendant to raise money for the purpose of the estate, he was entitled to a retransfer of the same, as the purposes for which they had been transferred had been satisfied; and as to the 76 shares, because the verdict should have been entered for the plaintiff, as the jury had found the sale of the same was a conditional sale, and that the condition had not been fulfilled, but had been in fact, broken by the defendant through his agent, Mr. MacLennan.

The plaintiff also, at the Easter Sittings, on the 20th of May last, obtained an order *nisi* upon the defendant to shew cause why the verdict entered for the defendant should not be set aside, and a verdict entered for the plaintiff, on the grounds, &c., substantially as set out in the notice of motion.

On the 30th of May Osler, Q. C., (*Nesbitt* with him,) supported the notice of motion and order *nisi*. The defendant is the brother of the widow of the late George Brown, and he assumed the management of the estate of George Brown at the request of the widow. The estate was involved, but owned 740 shares in the Globe Printing Company. In August, 1880, the plaintiff held 44 shares of the stock in that company, equal at par to \$22,000. The defendant proposed to the plaintiff, in aid of the estate of George Brown, that he, the plaintiff, should buy 76 additional shares in the stock of the company, the latter shares at par being equal to \$38,000, and that the

plaintiff should borrow that \$38,000 on the security of the 44 and 76 shares, equal to 120 shares. The plaintiff agreed to that proposal on the condition that he should continue in his office as general manager, or managing director of the company, to enable him to pay for the 76 shares, and the defendant agreed to that condition, and the plaintiff was appointed such manager, and he bought the 76 shares and gave his note for \$38,000 for the same, and he obtained the discount of the said note at the Bank of Montreal upon the security of the said 120 shares, which he transferred to the bank, and the defendant got the proceeds of the said note. The directors of the company confirmed the plaintiff's appointment as general manager on the 15th of August, 1880. The note matured in August, 1882. The defendant paid the bank, and got up the note, and also got the 120 shares which the plaintiff had transferred to the bank as security for the note.

The plaintiff was afterwards dismissed by the means of the defendant from his position as manager of the said company, in breach of the condition upon which his purchase of the 76 shares was made, so that he is not liable by reason of the breach of that condition to take or to pay for the 76 shares or the note given for the sum of \$38,000; and he claims a return of the 44 shares which he held of his own right before the purchase by him of the 76 shares, and which he had transferred to the bank in security for the payment of the said note, which 44 shares are equal at par to \$22,000.

The defendant has on his counterclaim obtained a judgment against the plaintiff upon the note for \$38,000, and he says he is willing and proposes to give up the whole 120 shares to the plaintiff, on the payment by him of the note for \$38,000.

The plaintiff would have been able to pay for the 76 shares if he had been continued in his position as manager of the company, because under his management the stock would have risen in value and he could have sold it then, or raised money upon it if he preferred to keep it. After he

was removed from the management the stock fell, and it has never recovered its value, and but for that promise he would not have bought the stock.

The note for \$38,000 is set out in the statement of defence to be made by the plaintiff payable to the Bank of Montreal, or order, but is not shown to have been endorsed by the banker, and the note when produced showed that Mr. Yarker, who was the manager of the Bank at Toronto, had endorsed the note in his own name, so that the defendant had no right or title to recover upon the said note against the plaintiff: *Bank of Upper Canada v. Ruttan*, 22 U. C. R. 451. The learned Judge had no power upon the findings of the jury, which are so directly in favour of the plaintiff, to enter a verdict against these express findings in favour of the defendant; *Moore v. Connecticut Mutual Life Ins. Co. of Hartford*, L. R. 6 App. Cas. 644.

The defendant has not moved against the finding.

The only agreement in writing is the one between the plaintiff and the bank upon discounting the note; but that is not the agreement between the plaintiff and the defendant.

The learned Judge held that if the sale of the 76 shares was a conditional sale, it did not go to the whole of the consideration, and was therefore not an answer to the claim made upon the note, but was the subject of a cross action: *Cutter v. Powell*, 2 Sm. L. C., 8th ed., 1.

The Judge has in effect entered the verdict and judgment for the defendant as if he had tried the case without a jury, and has disregarded the findings of the jury.

The defendant, in his evidence, denies that he had any part in the dismissal of the plaintiff, but he states he had heard of the intention to remove, and took no means to prevent it. The removal was by the board and not by himself.

Robinson, Q. C., contra. As to the entry of judgment and verdict by the Judge against the findings of the jury. The Judge, if of opinion that any finding of the jury is immaterial, or that there was no evidence to support it, may enter the verdict according to the evidence, and ignore the finding which is without evidence to support it. If

the findings are against the evidence the Court will grant a new trial, although the defendant has not applied for a new trial.

The Judge did not pass over the findings of the jury, he disposed of the case by acting on the findings in connection with the plaintiff's own evidence, which for the purpose he accepted as true.

The plaintiff is not entitled to get back the 44 shares until he pays for the 76 shares, as he gave the 44 shares in security for the payment of the 76 shares. The evidence is really all one way upon that point.

As to the 76 shares: the plaintiff was kept as managing director for the two years which the note for \$38,000 had to run, and beyond that time; and as he did not pay the note within that time, and a renewal of the note which he asked for was not given to him, there was no obligation to keep him longer in his office, for he was to have no longer day for payment of the note.

The terms of the Syndicate agreement for the sale of the stock belonging to the estate of the late George Brown shew the truth of the case. It reads:

"It is proposed to form a syndicate of not less than ten persons to purchase the stock of the Globe Printing Company held by the estate of the late Hon. George Brown. There are 758 shares, and it is proposed to purchase them at par. Arrangements can be made with a bank to advance the whole of the amount required, viz. \$379,000, for two years upon the security of the stock, and the personal guarantee of the members of the syndicate. Such guarantee shall only be given by each member of the syndicate to secure payment to the bank of principal and interest in respect of the advance made upon his own stock, and shall not be a joint or general guarantee.

* * * * *

We, the undersigned, are willing to become parties to the above syndicate to the extent of the number of shares set opposite our respective names.

Dated, August 4th, 1880.

Thomas Nelson	76 shares.
J. G. Brown	76 shares."

* * * * *



That agreement is consistent with the defendant's evidence, but not in any way with that of the plaintiff. The plaintiff said that was not the agreement. The agreement was one which he drew up. This agreement is a formal instrument, and no other document was produced.

The defendant sold these 76 shares to the plaintiff just as he sold them to the other subscribers to that document.

On the 24th of August, 1880, the plaintiff by a formal document assigned to Mr. Yarker, as trustee for the Bank of Montreal, the 120 shares he then held "*as collateral security*, as set forth in the annexed agreement." The agreement referred to provided that "the annexed assignment of 120 shares is made *by way of collateral security* for the payment of a promissory note for \$38,000, payable two years after date, with interest thereon at five per cent. payable quarterly, made by J. Gordon Brown to the Bank of Montreal." It provides also that the plaintiff "shall be entitled to the dividends on the stock except as to the amount the interest on the note may be in arrear," and that the plaintiff "may redeem the shares at any time by paying the note and interest at five per cent., or a part of it proportioned to the shares redeemed," and that the bank may sell in case of default, and such default continuing for more than a month.

There can be no rescission of a contract after a partial performance of it. The party complaining of a breach of it must claim redress by action. And there was such partial performance of the agreement, which the plaintiff says was made with him by the defendant to keep him employed as managing director until the profits of the plaintiff's stock enabled him to pay for it, (that is, for an indefinite time,) for he was employed as such for more than two years: *Pollock on Contracts*, 553-555; *Benjamin on Sales*, 4th Am. ed., secs. 621, 622; *Neill v. Travellers' Ins. Co.*, 31 C. P. 394, 7 A. R. 570, and now in the Supreme Court.

This agreement, which the plaintiff says was made to keep him in office as manager till the profits of the stock

paid for the stock, or for an indefinite time, is void also by the Statute of Frauds, as it is not in writing, and was to subsist for more than a year: *Agnew* on the Statute of Frauds, 180-183.

The probabilities of the whole case must be looked at. The defendant could not have performed any such promise. His death, among other causes beyond his control, must have made such a promise nugatory, and it is not likely therefore he could have made such a promise.

The facts here are quite against any such engagement having been made.

On the death of George Brown the plaintiff was appointed manager of the company during the pleasure of the directors. In 1881 new by-laws were made, and they provided for the election of the manager being yearly by the directors, and under these by-laws the plaintiff was elected manager in and for the years 1881 and 1882. It was in December, 1882, the plaintiff was removed from that office. The plaintiff was a director, and was one of those who concurred in the by-laws of 1881, which made his office an annual one.

If the defendant had made such a bargain as the plaintiff says he did with him, the plaintiff's concurrence in that by-law put an end to it.

It is quite incredible there could have been such a by-law consistently with such a bargain, and the plaintiff a party to both transactions. The plaintiff knew all about the affairs of the company, as he had been a member of it from the beginning, and in the office, as a prominent official, for many years.

There was a dividend of 16 per cent declared upon the stock for some years up to the death of George Brown, but since then there had been no dividend to declare. The plaintiff was anxious to bring as large an influence as he could into the business for his own purposes, and it was for that reason he bought the 76 additional shares which he is now endeavouring to get rid of because he finds the purchase does not pay.

The defendant, on the contrary, had no personal interest in the affairs of the company. He was acting for the benefit of his sister, the widow of the late George Brown. He has advanced large sums of his own for the benefit of that estate. He was anxious to sell the stock belonging to it for demands which had to be met. He did not require nor desire to borrow money for that purpose; he was of ability to do that without borrowing. That which he could not realize from the assets of the estate he could make good himself.

C. R. W. Biggar on the same side. This is a motion under Rule 510, O. J. A., to set aside the verdict and judgment of Rose, J., and to enter them for the plaintiff. It is not a motion under Rule 308 for a new trial. Three courses are open to the Court: 1. Adopting the findings of fact by both Judge and jury, to see whether, under section 44 of the Judicature Act, they entitle plaintiff to the relief which he claims. Rose, J., holds that they do not, and we urge the reasoning by which he arrives at this conclusion. 2. Under Rule 321, the Court, "having before it all the materials necessary for finally determining the questions in dispute," may deal with the whole matter, as was done in *Hamilton v. Johnson*, 5 Q. B. D. 263, and give the proper judgment, even against the findings of the jury, if there was no admissible evidence to support these findings: *Stewart v. Rounds*, 7 A. R. 515. We say this was the case with regard to question 4. The agreement with the bank was in writing. The bank was our agent, and parol evidence was therefore inadmissible to shew that the intention of the transfer was other than is therein stated: *Dominion Bank v. Blair*, 30 C. P. 591; *Merchants Bank v. Moffatt*, 5 O. R. 122. So also with regard to question 5. The evidence is all one way. (He read the evidence.) See as to the powers of the Court under Rule 321,—*Davies v. Felix*, 4 Ex. D. 32; *Daun v. Simmins*, 48 L. J. N. S. 343 (Com. Law); *Benschor v. Coley*, 52 L. J. N. S. 398 (Com. Law). 3. A third course open to the Court is to direct a new trial. [OSLER, J. A.—You have not moved for one.] *Biggar*.—We were not to move. The verdict

and judgment moved against are both in our favour. [OSLER, J. A.—I think the practice is settled the other way.] *Biggar*.—No; the case of *Macdonald v. Murray*, 2 O. R. 576, is relied on as an authority for the practice suggested, but the report shews why the plaintiff moved both upon notice under Rule 510, and by way of order *nisi* under Rule 308. To hold that the party who has the verdict and judgment must move within the first four days of the Sittings of the Divisional Court, while the unsuccessful party has, under Rule 528, until the seventh day of the same Sittings to bring on a motion by way of appeal from the judgment, would be to introduce a practice unwarranted by the Judicature Act, and productive of great and needless expense to every successful litigant; since he would be obliged in every case to order and pay for three copies of the evidence given at the trial, and to employ agents and instruct counsel in Toronto to move *quia timet* against his own verdict. The question is not as to the right of the successful party, but as to the power of the Court to order a new trial, and it is clear from Rule 462 that the motion need not be made within the first four days of the Sittings of the Divisional Court.

He then filed a motion paper for a new trial, and asked leave to make the motion now, which was reserved.

Osler, Q. C., in reply, opposed the motion made to be allowed to apply for a new trial, referring to *In re New Callao*, 22 Ch. D. 484; *In re Manchester Economic Building Society*, 24 Ch. D. 488; *Craig v. Phillips*, 7 Ch. D. 249; *Hamilton v. Johnson*, 5 Q. B. D. 263; *Yetts v. Foster*, 3 C. P. D. 437; *Mann v. English*, 38 U. C. R. 254; *Parsons v. The Citizens' Ins. Co.*, 43 U. C. R. 269. The syndicate agreement proven, was not the agreement upon which the 76 shares were sold. The others who bought stock for the defendant gave no security as he did, but their own notes merely, and that is one circumstance in favour of the plaintiff's statement of the case, that he gave the security to help the defendant in the management of the estate of **George Brown**. The agreement made by the plaintiff with

the bank does not shew what the agreement was between the plaintiff and the defendant—theirs was a verbal and not a written agreement. The defendant paid the \$38,000 note, as he should have done, and he is bound to restore the 44 shares of stock which the plaintiff pledged for the defendant's benefit. As to the 76 shares, he is not bound to take them, as the condition upon which his purchase was made has been broken. There was a conflict of testimony; the jury had to take either the one statement or the other, and they took that of the plaintiff, and the learned Judge had no right to interfere with it. The plaintiff was dismissed because of a disagreement between him and the defendant, and by the influence of the defendant. If the time the plaintiff was to be continued as manager was indefinite, and the agreement with respect to it invalid, it is of no consequence in this action, for the plaintiff is not suing in respect of it.

September 12th, 1884.—WILSON, C. J.—The pleadings in effect shew the plaintiff was to pay the note for \$38,000 in two years, and for that purpose he was to be continued as managing director of the company. He was dismissed after the expiry of those two years, and the note he had given had not been paid.

Upon these facts the answers of the jury to the first, second, and third questions do not entitle the plaintiff to a verdict upon them, because, although the sale of the 76 shares was conditional, and the plaintiff was to be appointed managing director at a salary of \$5,000 a year, and was to be kept in that position, the plaintiff *was* appointed as such manager at that salary, and *was* kept in that position for a longer period than the two years, which two years must be the period referred to and implied by the pleadings, as the note was to be paid by that time, and he was only to be retained in office to enable him to pay his note, the pleadings mentioning no other or longer time than the two years.

Then as to the fifth answer of the jury, the plaintiff,

according to the statement of claim, is not entitled to a verdict upon it, because the dismissal did not take place until after the lapse of the two years, and the plaintiff was not to be kept as such manager for a longer period than the two years.

Upon the fourth answer of the jury the plaintiff is entitled to a verdict, for the meaning of it, as I understand it, is this: The plaintiff for the purchase of the stock will give his note, payable in two years. The defendant wants to discount it at the bank to raise money upon it at once. To enable him to do that for the purposes of the estate of the late George Brown, which he represents, the plaintiff agrees to pledge to the bank, not merely the 76 shares for which purchase the note was given, but also the 44 shares which he holds independently of the purchase of the 76 shares, as an inducement for the bank to make such discount to the defendant; and so soon as the bank is repaid the discount so made, whether the payment be made by the defendant or by the plaintiff, these 44 shares are to be returned to the plaintiff.

If the pleadings are disregarded and the case is put upon the ground stated by the learned Judge, the case then is this: "I, the plaintiff, am not to pay the note in two years. I am not to pay it at all. The note is in effect an accommodation note, made for the defendant's benefit. I, the plaintiff, am to pay for the 76 shares, which I bought, upon the condition that I am appointed managing director at the salary of \$5,000 per annum, and am retained in that position until I can pay for these shares which from the evidence would appear to be out of the profits of the stock), and out of such part of the salary as I may be able to save."

And the plaintiff says that through means of the defendant he, the plaintiff, was dismissed from his office of managing director before such payment could be made.

The defendant says the findings of the jury do not in law entitle the plaintiff to a verdict, because these facts shew that the condition as to retaining the plaintiff in the office of manager was a condition independent of the agreement

to pay for the stock ; and the plaintiff must pay the \$38,000 and bring an action for the damages he has sustained by not being kept on as managing director of the company ; and that these facts show there has been a partial performance by the defendant of that agreement by his assignment of the 76 shares to the plaintiff, and by the appointment of the plaintiff as managing director of the company, and his receipt of the salary of the office for more than two years ; and that there can be no rescission now in such a case. The defendant also says the agreement to continue the plaintiff in the office of managing director is void by the Statute of Frauds, as it is for the doing of an act which is not to be performed within one year from the date of the agreement, and the agreement is not in writing.

Upon such a view of the case the plaintiff may still be entitled to a verdict on the finding of the jury as to the \$22,000, as that finding is based upon a mere conflict of testimony as to the facts, and is in no way affected by any question of law ; but the defendant will be entitled to retain his verdict upon the other findings according to the Judicature Act, sec. 44, as the law of the case applicable to the case is plainly against the plaintiff. There is no doubt there has been a partial performance by the defendant of his agreement to appoint and retain the plaintiff as Managing Director at \$5,000 a year. The parties cannot be replaced in their original position. The contract cannot therefore be rescinded. The plaintiff's claim for not continuing him in his office for a longer period—that is, until he could pay for the 76 shares—assuming, of course, that to have been the agreement—will not defeat the claim of the defendant to be paid for the shares. The plaintiff must resort to his recovery for a wrongful dismissal by the defendant, and claim such damages as will indemnify him for the wrong which has been done to him : *Carter v. Scargill*, L. R. 10 Q. B. 564, and the cases there cited ; *Pollock on Contracts*, 3rd ed., 553, 555 ; *Hunt v. Silk*, 5 East p. 449, and other cases referred to by the learned Judge in his judgment.

The defendant, however, contended that the plaintiff could not recover at all in respect of the wrongful dismissal, because it was a stipulation or part of the agreement which was not to be performed within the period of one year.

That does not seem to be a valid objection, for that provision of the Statute of Frauds is held not to apply where all that has to be done upon the one side has been performed; and here the defendant, who, upon his part, was to sell to the plaintiff 76 shares of stock, has completed his portion of the agreement; and all that remains to be done now is for the plaintiff to pay for the shares, without reference to his being managing director, or being retained as managing director long enough to enable him to pay for the shares: *Bracegirdle v. Heald*, 1 B. & Al. 722; *Christie v. Clarke*, 16 C. P. 544; *Cherry v. Heming*, 4 Ex. 631; *Peter v. Compton*, 1 Sm. L. C., (8th ed.,) 353 *et seq.* But, however that may be, it is sufficient that the contract as to the 76 shares cannot wholly be rescinded, and that the plaintiff must pay for them, and claim his compensation for the alleged wrongful dismissal by a cross-action.

The learned Judge has, I think, rightly given judgment for the defendant upon all the findings but the fourth, which relates to the \$22,000; and as to it he has rightly given judgment upon it for the plaintiff, although the plaintiff in his rule has treated it as entered adversely to him. The result is, the plaintiff will have judgment for the recovery of the 44 and the 76 shares upon the findings of the jury and the judgment of the learned Judge; and the defendant must retransfer the 120 shares to the plaintiff. The defendant will have a judgment for the \$38,000, with interest thereon from the maturity of the note, notwithstanding any finding of the jury to the contrary, because with respect to that sum "the facts proved are not sufficient in point of law to entitle the plaintiff to judgment," according to the Judicature Act, sec. 44.

The parties must now make up the pleadings as they desired them to be considered by the Court and jury at the trial.

The notice of motion and order *nisi* will be discharged. There will be no costs of this motion to either party, the plaintiff will be allowed the general costs of the action, and the defendant to be allowed his costs of so much of the counter-claim and issues and matters on which he has succeeded.

OSLER, J. A.—Upon the finding of the jury, taken in connection with the admitted facts as to the plaintiff's appointment to office and subsequent dismissal, I am of opinion that the defendant is entitled to judgment in respect of that branch of the plaintiff's claim which seeks that he may be relieved from the purchase of the 76 shares and for the cancellation of the note, on the ground that the breach of the alleged agreement to keep the plaintiff in office is no answer to his liability on the note.

He *was* appointed. He *was* kept in office until after the maturity of the note, and he was subsequently dismissed. That, as it seems to me, forms ground of a cross-action for damages for breach of the agreement, and not a defence to a claim upon the note. The plaintiff has not shaped his action in that way, nor indeed would it be of any avail to him on this motion if he had done so, as no damages have been assessed for breach of the agreement. Having read the evidence more than once, and having examined the authorities cited in the judgment of my brother Rose on the argument, I shall only add that in thus disposing of this branch of the plaintiff's claim, I concur in the reasons assigned in the judgments of my learned brother and of the Chief Justice for so doing. Even if I could have held that on the findings as entered the plaintiff was entitled to judgment, I should have great difficulty in convincing myself that there was really any such agreement between the parties, as the answers of the jury to the third and fourth questions find. I think those answers so much against the weight of evidence that, if necessary, there should be a new trial. If there was any such agreement, my present opinion is that it must be treated as having been

put an end to when the plaintiff accepted office under a new tenure and became a party to the change in the rules and by-laws which affected his appointment.

With regard to the power of the learned Judge to enter a nonsuit notwithstanding the findings, a question upon which we heard a good deal of argument, it is not necessary to say anything, as the judgment for the defendant is right as a matter of law upon the findings. Besides, as I read the report of the trial, the parties seem to have assented to the learned Judge dealing with the case as on a motion for a nonsuit.

But if there had been no assent to this course, I should think, speaking for myself, that when the Judge has submitted to the jury either the whole case generally, or questions, on the answers to which the case will turn, the only course he can take is to act upon the verdict or answers, by directing the appropriate judgment. He cannot, as I think, afterwards take the case out of the hands of the jury by nonsuiting, unless it was submitted to them, as it were, provisionally.

The other branch of the plaintiff's claim related to the 44 shares, and is disposed of by the answer of the jury to the fourth question. That answer has not been moved against by the defendant, and it supports, and the plaintiff is entitled upon it to a judgment in his favour for the return of those shares.

Some difficulty was experienced in argument, and we have not been entirely free from it in considering the case, owing to the fact that no judgment had been formulated on the findings. If this had been done there would probably have been no discussion with regard to this part of the case. The plaintiff seems to have thought it was necessary for him to move against the judgment in respect of them; and the defendant insisted that as to them the judgment was substantially in his favour.

The result is, as to the plaintiff's claim, that the plaintiff is to have judgment for the transfer to him of these 44 shares absolutely and unconditionally; and, if he desires it,

of the 76 shares also, though the declaration as to the latter will be more properly inserted in that part of the judgment in favour of the defendant dismissing the motion to enter judgment for the plaintiff for cancellation of the note, and to relieve him of the 76 shares in question.

As to the counter-claim, the motion will be dismissed, and the judgment for the defendant given at the trial will stand, on the ground on which it was put by the learned Judge, viz: that, notwithstanding any defect in the endorsement, (as to which see *Small v. Riddell et al.*, 31 C. P. 373, in addition to cases cited,) the defendant is entitled to recover on the original consideration.

There will be no costs of this motion; and the order as to costs made at the trial, (the judgment there given being varied,) will be also varied, and each party will recover costs in respect of that portion of his claim and counter-claim on which he has succeeded.

Judgment accordingly.

[QUEEN'S BENCH DIVISION]

REGINA V. BUNTING ET AL.

*Ontario Judicature Act—Constitution of Courts—Criminal proceedings—
Removal of indictment by certiorari—Practice.*

An indictment was found against the defendants in the High Court of Justice at its sittings of Oyer and Terminer and Gaol Delivery, and on being called upon to plead the defendants demurred to the indictment. A writ of *certiorari* was subsequently obtained by the defendants, in obedience to which the indictment, demurrer, and joinder were removed to the Queen's Bench Division. Upon the return the Court took out a side-bar rule for a *concilium*, and the demurrer was set down for argument. A motion was made by the defendants to set aside the proceedings of the Crown on the ground that they should have been called upon to appear and plead *de novo* in this Division.

Held, WILSON, C. J., dissenting, that the Court of Assize of Oyer and Terminer and General Gaol Delivery is now, by virtue of the Judicature Act, the High Court of Justice : that the indictment was found, and the defendants appeared and demurred thereto in the High Court of Justice; and that it was not necessary to plead *de novo* to the indictment.

Per ARMOUR, J., and O'CONNOR, J. The Supreme Court of Judicature is not properly a Court, and ought more properly to have been called the Supreme Council of Judicature. The Divisions of the High Court are not themselves Courts, but together constitute the High Court, which is thus divided for the convenience of transacting business; and the Judges sit as Judges of the High Court, and exercise the jurisdiction and administer the jurisdiction of the High Court.

The recognizance entered into by the defendants, on the removal of the proceedings to this Division, provided that they should "appear in this Court and answer and comply with any judgment which may be given upon or in reference to a certain indictment, &c., or upon or in reference to the demurrer to such indictment, and plead to said indictment if so required."

Per WILSON, C. J. *Semble*, that the practice and procedure before the Judicature Act should be maintained in its entirety; though possibly it might be varied by agreement. By the recognizance the defendants had not agreed to vary it, but they might thereunder elect to appear and answer to the indictment or to appear and argue the demurrer; and they, being ready to appear and answer the indictment, would fully perform the condition of the recognizance by so doing.

THE defendants were indicted at the last Spring Sittings of the Court of Oyer and Terminer and General Gaol Delivery at Toronto for conspiring corruptly and illegally to influence and procure certain members of the Ontario Legislature to vote in favour of certain resolutions to be introduced into said Assembly, by payment to said members of certain bribes.

The indictment was indorsed (but was not in the inside so entitled): "In the High Court of Justice for Ontario, at Oyer and Terminer and General Gaol Delivery."

To this indictment the defendants demurred, entitling their demurrers in the same way.

Upon the return, under *certiorari*, of the proceedings to this Division of the High Court, a side-bar rule was issued by the Crown for a *concilium*, and the demurrers set down for argument.

November 22nd, 1884. *McCarthy*, Q. C., and *Richards*, Q.C., with them *W. A. Foster*, moved to set aside the side-bar rule for a *concilium* issued by the Attorney-General herein and the copies served on the defendants, and to strike out the demurrers set down for argument, and the setting down thereof, and to set aside the copies and service of the notices of argument, for irregularity, in this — that no appearances to the writ of *certiorari* issued had been filed or entered on behalf of the said defendants at the time such proceedings were taken or since: that no rule to appear or plead had been served or issued, and no pleadings filed by or on behalf of said defendants: that the Attorney-General had no right to take the conduct of the cause, or to proceed, or set down the said demurrers: that the return to the said *certiorari* was, when said side-bar rule issued, and said demurrers were set down, and said notices were served, imperfect and incomplete.

Irving, Q. C., and *Bethune*, Q. C., shewed cause.

The arguments appear in the judgment.

November 28, 1884. WILSON, C. J.—The motion before us is a very perplexing one, and has occasioned to myself a good deal of consideration.

The motion is to set aside the side-bar rule for a *concilium* and the proceedings set down by the Crown for the argument of the demurrer put in by the defendants in the Criminal Court to the indictment which was found there, because, the defendants say, the demurrer and joinder put

in while the cause was pending in the Criminal Court do not remain as part of the proceedings in the cause upon the removal of these proceedings to this Court, but the parties must proceed here upon and from the indictment *de novo*.

The practice certainly was so before the Judicature Act, and the defendants say by section 87 and Rule 484 of that Act, and the Dominion Act 46 Vict. c. 10, sec. 2, the practice and procedure in criminal matters are not affected by the Judicature Act, but are to "be the same as the practice and procedure in similar causes and matters before the establishment of the said High Court." The counsel for the Crown contend that as the High Court, which consists of the Queen's Bench, Chancery, and Common Pleas Divisions, has vested in it the jurisdiction which at the passing of the Judicature Act "was vested in, or capable of being exercised by, the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery"; and as the High Court "shall be deemed to be and shall be a continuation of the said Courts respectively (subject to the provisions of this Act) under the name of the High Court of Justice aforesaid:" section 9; and as "the several jurisdictions vested in the said High Court of Justice shall cease to be exercised except in the name of the said High Court of Justice, save as otherwise in this Act provided:" section 10;—the Criminal Courts are now as completely part of the High Court as the Divisional Courts are; and that it follows, as a mere consequence of that legislation, that the proceedings taken in the Criminal Courts remain as part of the record in this Divisional Court valid and available here, because the proceedings are in the High Court of Justice, the one and the same Court of which the Criminal Courts and the Divisional Courts are respectively parts. It appears the writ of *certiorari* has since the Judicature Act issued from the Queen's Bench Division for the removal of a cause from the Central Criminal Court: *Bradlaugh v. The Queen*, 3

Q. B. D. 607; and a *mandamus* was applied for directed to the Judges and Justices of the Central Criminal Court: *Regina v. The Judges and Justices of the Central Criminal Court*, 15 Cox, C. C. 324; and in neither case was it said the writ could not go to that Court, although it is one of the Courts whose jurisdiction has been transferred to and vested in the High Court of Justice by the Judicature Acts; *FitzAdams's* Judicature Acts, 16; *Rogers's* Judicature Acts, 101, 177.

If there is no substantial difference between the direction of a writ of *certiorari* or *mandamus* to the Judges of a Criminal Court, the jurisdiction of which is vested in the High Court, and which writ is a matter of procedure, and the appearing and pleading *de novo* in this Court after the removal of the cause from the Criminal Court, which is a matter of practice rather than of procedure, the motion before us must prevail.

There is some difference between the removal of a cause from or an order which is issued to a Court of first instance to perform a particular act, and the practice to be followed in the Court to which the cause is removed in the prosecution of that cause after removal. The former practice and procedure in criminal cases and matters no doubt must still be maintained according to the provisions made expressly for that purpose; that is, there must be a grand jury to find or to ignore the bill of indictment; the rules of evidence and of law especially applicable in such cases must be observed; the right to challenge and the right to trial by jury must be preserved, and the like; and such a course of procedure cannot be altered unless by an Act of the Dominion Parliament. And so also if the cause be removed from the criminal Court to this Court, the like general rules and procedure must be maintained in the prosecution of that cause. But a mere course of practice such as regulates the notice and procedure, when the cause is removed by *certiorari*, to be taken for a view or for a special jury, or to argue a demurrer; or whether the proceedings taken in the original Court shall

or shall not stand, and be the proceedings in the Court to which the cause is removed by *certiorari*, being a mere matter of practice and capable of being regulated from time to time by the Court itself, seem not to be that kind of practice and procedure which the statutes have so specially provided shall be maintained.

Yet there is much to be said in support of the argument that the practice and procedure in its entirety must be continued in its minutest detail, however unnecessary it may be from the language of the Acts.

It was much disputed whether the removal of a cause by *certiorari* required the pleading *de novo* in the Court to which the proceedings were removed: *Woodcraft v. Kinaston*, 2 Atk. 317; *Highmore v. Barlow*, Barnes 421; *Gilbert on Executions*, 144.

There seems to be no necessity for appearing, or for demurring, or for joining in demurrer, when the party has appeared and demurred, and a joinder in demurrer has been already added.

The reasons given for that practice were :

1. That while the pleading was *ore tenus* the Court to which the proceedings were removed could not, without pleading anew *ore tenus*, know what the pleadings were.

2. That the Superior Court could make no continuance unto the proceedings in the original Court, and

3. That it was beneath the dignity of a Superior Court to adopt and carry on the proceedings taken in the inferior Court.

The first reason ended about six hundred years ago, and the others are not satisfactory. Still the practice had, notwithstanding that doubt and difference of opinion, become settled that the proceedings should be gone on again *de novo* in the higher Court.

I do not know that it is so invincible a practice that it cannot be varied under any circumstances; for if the parties were to agree to dispense with that strict observance of it, the Court might permit it in such a case as this. The question then is, have the parties agreed to

waive, so far as they can, the strict practice in that respect? By the terms of the recognizance which was settled upon between them, they have provided that if the defendants "should appear in this Court on, &c., and answer and comply with any judgment which may be given, or order made upon or in reference to a certain indictment found and pending in the High Court at the sittings, &c., or upon or in reference to the demurrer to such indictment, and plead to said indictment if so required, &c."

The counsel for the Crown say the defendants are bound to treat the demurrer as a subsisting proceeding, and to argue it upon the usual notice required to be given, and for that purpose it must be assumed the defendants have appeared in this Court to argue the demurrer.

The defendants admit they are bound to appear and answer, and that they have not done so. But they contend that no proceedings can go on in this Court until they have appeared and answered, and that they are not bound to do either until they have been duly called upon to perform that condition of their recognizance, and no such call has been made upon them. They say also they are not bound to appear and answer to the demurrer; for if they appear and answer to the indictment that would be a performance of their recognizance, and they must be called upon to do that. I think the defendants may fulfil that which they have bound themselves to do by the performance of either part of their engagement; that is, by appearing and answering, or complying with any judgment given or order made upon or in reference to the indictment, or to the demurrer. They should, therefore, as the election rests with them, have been required to appear and answer to the indictment, or to the demurrer. They say they are ready to appear to and answer the indictment, but that they are not ready or willing to appear to and answer the demurrer; and as their contention in the construction of the recognizance in that respect is right, I do not think it can be said they have bound themselves to appear or answer to the demurrer, and to answer or argue it.

My opinion has throughout been strongly opposed to the argument of the defendants, and I have endeavoured, as far as possible, to support that opinion, for there is no kind of merit in the objection, and the practice insisted upon by the defendants is useless, inconvenient, dilatory, and may be expensive; but I think I must, however unwillingly, give effect to it.

The Judicature Act, Rule, and Dominion Act, in words plainly leave untouched and preserve the former practice, and I am not satisfied that practice has been altered by the mere force and operation of that legislation in vesting the jurisdiction of all these criminal Courts in the High Court, as I was very strongly inclined to hold; for not only is the jurisdiction of these Courts taken from them, but the very names of the Courts are abolished, and when both name and jurisdiction are gone, what is then left of them? And there are also many other parts of the Act which are more consistent with all of these Courts, and the others which are named in the Act, being now represented only by the High Court, and with their having no other existence but as the High Court, than that they are still as distinct and separate Courts as they were before the Act; and that all the legislation about the transfer of jurisdiction, the abolition of the name, and conferring of a new name and the like, have really no other meaning or purpose than to leave things just as they were before the Act. I think, however, I am obliged to say the order *nisi* of the defendants must be made absolute, but the sooner the practice in question is altered, as it can be by rule of Court, the better.

ARMOUR, J.—By the Judicature Act the Court of Appeal, the Court of Queen's Bench, the Court of Chancery, and the Court of Common Pleas, are united and consolidated together and made to constitute one Supreme Court of Judicature for Ontario. The Supreme Court is made to consist of two permanent divisions, the said Courts of Queen's Bench, Chancery and Common Pleas being constituted one of such divisions, and being called "The High

Court of Justice for Ontario," and the said Court of Appeal being constituted the other division, and being called "The Court of Appeal for Ontario." The Court of Queen's Bench, is called the Queen's Bench Division of the High Court, the Court of Chancery the Chancery Division thereof, and the Court of Common Pleas the Common Pleas Division thereof; and the Judges of the said three Courts or Divisions are called Justices of the High Court. The High Court of Justice is made a Superior Court of Record, and, subject as therein mentioned, is made to have the jurisdiction which was theretofore vested in or capable of being exercised by the Court of Queen's Bench, the Court of Chancery, the Court of Common Pleas, and Courts of Assize, Oyer and Terminer, and Gaol Delivery, and is made a continuation of the said Courts, respectively, under the name of the High Court of Justice; and thereafter the several jurisdictions so vested in the said High Court of Justice are to cease to be exercised except in the name of the High Court of Justice.

A good deal of difficulty has been created by the inaccurate and indiscriminate use of the term Court, in the Act, and by calling things Courts which are not properly Courts.

According to Blackstone, "in every Court there must be at least three constituent parts, the *actor*, *reus*, and *judex*; the *actor* or plaintiff, who complains of an injury done, the *reus* or defendant, who is called upon to make satisfaction for it, and the *judex* or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain and by its officers to apply the remedy" (a).

The Court of Appeal for Ontario, and the High Court of Justice for Ontario, are the only Courts named in the Act having these requisites, and are the only Courts properly so called constituted by the Act. The Supreme Court of Judicature for Ontario is not properly a Court, although called Court, just as the Legislature of Massachusetts is called the General Court of Massachusetts, and it ought more properly to have been called the Supreme Council of Judicature.

(a) 3 Bl. Com., 4th ed., pp. 23, 24.

The Queen's Bench, Chancery, and Common Pleas Divisions of the High Court, are not themselves Courts, but together constitute the High Court of Justice for Ontario, which, for the convenient continuance and transaction of business, is thus divided. Not less than two nor more than three of the Judges of the High Court, when sitting together, are called a Divisional Court of the High Court of Justice, but this is a mere name of convenience serving to designate them when so sitting; but they really sit as Judges of the High Court, and do but exercise the jurisdiction and administer the functions of the High Court of Justice.

What was formerly the Court of Assize, of Oyer and Terminer, and of General Gaol Delivery, is now the High Court of Justice, and the indictment in this case was found in the High Court of Justice, and properly so found, and the defendant appeared in the High Court of Justice, and demurred to the said indictment in that Court, and the Crown joined in demurrer in that Court, and this is that Court; so that what the defendant has done he has done in this Court.

It is true that there is no provision in the Act for transferring the indictment, demurrer, and joinder from the Clerk of Assize to the Registrar of the Queen's Bench Division of the High Court of Justice, that is, from one Clerk of the High Court of Justice to another Clerk of that Court; and this omission may have been intended lest it should seem to be an interference with criminal procedure, which I doubt if it would have been; but I see no reason why, in the absence of such a provision, any Judge of the High Court might not have made an order for such transfer.

However this may be, the indictment, demurrer, and joinder are now with the said Registrar, and in my opinion nothing more is necessary to be done but to proceed to dispose of the question of law raised by the demurrer. In my opinion the rule should be discharged.

O'CONNOR, J., concurred with ARMOUR, J.

Order nisi discharged.

[CHANCERY DIVISION.]

CAMPBELL V. COLE.

Interpleader—Goods claimed by wife—Separate business—R. S. O. c. 125, s. 7—Verdict for claimant set aside and judgment given for defendant—Rule 321.

In an interpleader issue to try the right to certain goods seized under an execution against A. and claimed by B., his wife, it appeared that since their marriage a store business had been carried on in the name of the wife, and that frequent trades and transactions in real estate had also taken place in her name, but that in most of them the husband was the bargainer, and it was only when the bargains had to be carried out that the wife appeared in them: that the husband kept the store books, which she said she did not know much about, as she was no scholar: that the husband made nearly all the purchases of stock, and sold goods, and spoke and acted as if he were the owner: that he was not in receipt of wages, but took what money he wanted out of the store when he pleased, and in the transaction out of which the judgment and execution arose under which the stock was seized, he opened the negotiation by a letter signed by himself, referring to the property he offered in trade as *his* property, and when the bargain was closed took a deed of the store in his own name, and gave back a mortgage and his own note for the balance due. The jury, in the face of the Judge's charge in favour of the execution creditor, found that the stock was the property of the wife, that she did not act fraudulently, and that she carried on business separate from her husband.

Upon a motion to the Chancery Divisional Court to set aside the verdict and to enter a verdict for the defendant or for a nonsuit, or for a new trial, on the ground that the verdict was contrary to the evidence and to the direction of the Judge, and perverse, and that it was against the weight of the evidence, it was

Held, that the business was not one protected by R. S. O. ch. 125, sec. 7; that the verdict could not be sustained; and under Rule 321, O. J. A. and R. S. O. ch. 50, sec. 383, it was set aside and judgment entered for the defendant.

Murray v. McCallum, 8 A. R. 277, referred to and distinguished.

THIS was an interpleader issue between Christiana Campbell and John Fletcher Cole, to try the right to certain goods and chattels, which were seized by the sheriff of the county of Elgin, under an execution against the claimant's husband at the suit of said Cole.

The issue was tried at London on April 29th, 1883, before Cameron, J., and a jury.

At the trial the plaintiff swore that she was married in 1874: that her husband was then station master at Eldon station: that she purchased a lot for \$60 received from her people before her marriage, and that on her wedding day

she received \$250 from her father, mother, and brothers, with which she built a little house and store on the lot, and stocked the store with a few goods, and carried on business there for about a year, when she sold the house and store to Albert Greig for \$500, and removed the goods to Bolsover, where she rented a store, and carried on business for nearly a year: that her husband went with her, not being able to do much as his health was bad: that he occupied himself hunting and fishing, and sometimes he looked after the books for her, but that she managed the store herself: that the next place she carried on business in was Argyle, where her father rented a store for her, and to which place she removed her goods, and replenished her stock just as she wanted goods, making all the purchases herself: that she subsequently purchased a lot from John Neil Campbell, and built a store on it, and carried on business there for about a year, when she rented it to Anderson & McCarty, and moved to Meadowvale: that before she moved to Meadowvale she purchased a farm in Rama from John Anderson for \$1000, which she paid for by assuming a \$900 mortgage, and paying the balance in goods: that after making some improvements on it, and holding it for two years, she sold it to Robert Campbell for \$1,800, he assuming the \$900 mortgage, on which some payments had been made, paying her \$500 cash, and giving her a mortgage for \$530: that she then bought a farm from Mr. Cathcart, in the township of Dalton, for \$800, by assuming a mortgage, and paying the balance in goods, but before she paid anything on the mortgage she traded the farm to a Mrs. Motson for a farm in Thorah, receiving some cash in addition: that she purchased two houses in Yorkville from Joseph Davis, in 1881, giving Robert Campbell's mortgage to her on the Rama farm in part payment: that she traded these houses to one Hardy for a stock of goods in Meadowvale: that she then removed to Meadowvale and rented a store there from her husband, which he had bought from Hardy: that she was burned out there, and received \$2,500 insurance on her goods, part of which

were saved: that she then removed to Lawrence Station with the remnant of her stock, and purchased more from C. B. Campbell, for which she paid him with her insurance money and some money borrowed from her mother-in-law: that all through her business she never agreed to pay her husband anything, or give him any interest in the business, but just kept him in board and clothes, and supported the family, and he did the most of the writing as an agent for her: that her husband was not in difficulty before she married him.

On cross-examination she admitted that a judgment had been recovered against her husband in 1875 in a breach of promise suit: that she was not much of a scholar herself, and that her husband made the entries in the books for her: that she also didn't know, without her husband's assistance, which book the entries were in: that she didn't know the names of the books, and that if she borrowed money from her relatives while her husband was absent she would tell him when he returned, and he would "mark it down": that she could not tell where the entries in her ledger came from, as her husband made them: that she saw the books, but didn't go over them as "she was no scholar, and couldn't make the accounts up": that whatever her husband said the books contained she accepted and adopted: that when she traded her houses to Hardy she signed no written agreement, and none was signed that she knew of, and she gave her note for the balance coming to Hardy: that she paid rent to her husband in Meadowvale, both for the store and house as well: that the bargain for the sale of the houses to Hardy was made with her: that since 1874 her husband never had any store goods of his own, and the whole business was carried on by her,

A letter to John D. Hardy & Son, signed by William Campbell, and dated October 11, 1881, in which he speaks of the farm as *my* farm, and says, "*I* would exchange *my* place with you for groceries and liquors, and rent your building for a while and see how *I* would like the place

* * *I* would give good title, &c., of farm, &c.," was put in.

An agreement as to the sale to Hardy, signed by Hardy and Campbell, was also put in.

The witness continued, that she instructed her husband to write to Hardy for her, but that he did not read the letter over to her or show it to her, and that she did not authorize him to write it in his own name : that she never saw the agreement before, and never authorized it.

Albert Greig, who purchased the Eldon lot and house, testified that he made the bargain with Mrs. Campbell, but on cross-examination said it was Mr. Campbell who first spoke to him about it, and when he ascertained it was in Mrs. Campbell's name he arranged with her : that she first wanted \$600, but he purchased for \$500.

William Campbell, plaintiff's husband, corroborated his wife's evidence, and said: that he just spoke to Greig about purchasing his wife's property, and told him she wanted \$500 for it : that he kept the books : that when he wrote to Hardy in pursuance of his wife's instructions he didn't show her the letter, and didn't remember whether he told her anything about it, and in answer to a question from His Lordship, said he couldn't tell whether he worded it the same as she told him or not : that his wife wanted to change her residence in order to get nearer a school, and that she instructed him to write Hardy to see if he would exchange his store of goods for hers, and that he didn't think there was anything in the letter about any other property.

The letter was then put into his hands, when he continued: that his wife did not know the first thing about his signing his own name to it as he never mentioned it to her : that when he called the place *his* farm he said what was not so : that he had no settled wages, but was kept and clothed, and did as he liked, and his family of four children were kept: that he signed his own name to the note to Hardy for the balance due on the goods sold to his wife: that he purchased goods for his wife : that he might have paid John McDonald & Co. \$200 for goods in January, 1881, and taken the receipt in his own name: that he did

nearly all the buying: that if he wanted money he would take it, and not ask his wife for it, taking \$5 or \$10 at a time.

C. B. Campbell was called, and testified that he sold his stock to Mrs. Campbell, received the money from Mr. Campbell for her, and gave a receipt in her name.

On cross-examination he said that Campbell came to him first, and up to the time of taking stock after the arrangement for the sale had been made, he thought he was selling to Campbell. At the stock-taking, Campbell told him he could get no money until his wife came, as she handled the cash, and it was not until he was being paid and was asked by Campbell, who paid him, for a receipt in the wife's name that he knew anything of selling to the wife.

John D. Hardy, called for the defence, testified that he sold his house, store, and goods, in Meadowvale, to Campbell, in 1882: that he had advertised them for sale, and had been put in communication with Campbell through an agent or broker in Toronto: that Campbell wrote him, and came and saw the stock, and was satisfied with it, and arranged for him to go and see his property in Yorkville, which he did, and then went and saw Campbell in Argyle: that he made all the bargain with Campbell, and Campbell drew up the memorandum of agreement which was signed by Campbell and himself: that Campbell never said that he was buying for his wife: that Campbell came and took stock, and when everything was settled he gave a deed of the store to Campbell and received a mortgage back, and got Campbell's own note for the balance due for the stock: that Campbell acted in the store selling goods as if he owned them, and hired witness's son as a clerk: that Campbell told him when he gave him the note that he had plenty of money, a store, and a farm: that the mortgage given by Campbell was assigned to the defendant Cole, and is the cause of action upon which the judgment is grounded, under which the goods claimed in this action were seized.

John Beattie testified that he first met Campbell at Meadowvale when he went there to represent Hardy on

the stock-taking, when he sold out to Campbell: that Campbell was with him taking stock, and told him that he had purchased it: that he acted all through the stock-taking as if he were the purchaser, and never said a word about his wife being the purchaser: that he sold some of the goods there, and told the customers in two or three instances that he had bought out Hardy, and was going to carry on the business: that he (Beattie) drew up the note to Hardy which Campbell signed, and nothing was said about Mrs. Campbell signing it.

The learned Judge who tried the case charged the jury strongly in favour of the defendant, and, amongst other things, drew their attention to the facts that when Greig purchased the place at Eldon it was Campbell he first dealt with, and did not discover that the property was in Mrs. Campbell's name until afterwards: that the breach of promise case was hanging over Campbell's head: that Mrs. Campbell seemed unacquainted with the books, and that Campbell made nearly all the purchases: that Campbell wrote the letter to Hardy in his own name: that Hardy said he made his bargain with Campbell: that Mrs. Campbell, a woman of no extra business capacity, seemed to be speculating in property all over the country: that Beattie's evidence flatly contradicted Campbell's: that Mr. C. B. Campbell, who sold the stock at Lawrence, negotiated the transaction with claimant's husband: that Campbell was not paid anything for his services, but helped himself to money whenever he wanted it; and that Campbell gave his own note to Hardy for the stock.

The jury found that the property was the property of the claimant: that she did not act fraudulently, and that she carried on business separate from her husband.

The defendant moved before the Divisional Court to set aside this verdict, and to enter a verdict for the defendant or a nonsuit, or a new trial, on the ground that the verdict was contrary to the evidence, and to the direction of the learned Judge and perverse, and that it was against the weight of the evidence; and the motion was argued before

Boyd, C., and Proudfoot and Ferguson, JJ., on the 21st and 22nd of February, 1884.

Cassels, Q. C., and *Stonehouse*, for the motion. The business was not the separate business of the wife, *Murray v. McCallum*, 8 A. R. 277; *Harrison v. Douglass*, 40 U. C. R. 410. The business might be separate as between the husband and wife when it would not be as against the husband's creditors, (reads Judge's charge at the trial.)

It is not necessary for the defendant to go as far as to show that the whole business was a fraud, but only that the husband actively interfered in it. It is a matter of law that it was the husband's business, and the evidence clearly shows it.

Osler, Q. C., contra. There is no evidence that the suit for breach of promise was likely to be brought against the husband until after the wife started her store. She received the money to start with from her own relations. The stock and insurance were both in the wife's name: *Ashworth v. Outram*, 5 Ch. D. 937; *Lovell v. Newton*, 4 C. P. D. 7. The facts in this case are very different from *Meakin v. Sampson*, 28 C. P. 355. In this case the wife carried on the business and the husband was not in debt; but in that case the husband was insolvent, and carried on the business under a power of attorney from the wife as a mere cloak. Our *Married Woman's Property Act*, R. S. O. C. 125, is different from the Imperial statute, and takes the case out of the English cases. The Court will not interfere with the Jury's finding even when it is against the opinion of the Judge. The wife's title cannot be taken away from her by any agreement made by the husband: *Tuer v. Harrison*, 14 C. P. 449; *Hilliard* on New Trials, 2nd ed., 447.

Cassels, Q. C., in reply. Verdicts can be and are constantly set aside by the Courts: *Canada Central R. W. Co. v. McLaren*, 8 A. R. 564.

June 19, 1884. BOYD, C.—This is an interpleader issue, in which the plaintiff is a married woman who claims the goods seized by the defendant, an execution creditor of her husband, as being her property used in carrying on a trade separate from her husband. The issue was tried by a jury before Cameron, J., who charged strongly in the defendant's favour. But the jury gave a sympathetic verdict in favour of the wife, which is now moved against. Assuming that the jury believed all the evidence given by the plaintiff and her witnesses, and disregarded that for the defence, I think the proper conclusion from the then indisputable facts proved by the plaintiff is, that the business in question was not one which is protected by the statute: R. S. O. ch. 125, sec. 7.

It is needless to go behind *Murray v. McCallum*, 8 A. R. 277, in search of the law applicable to this case. The Court was there equally divided, but assuming that the views held by the Chief Justice and Cameron, J., are preferable to those enunciated by Burton and Patterson, JJ. (the other members of the Court of Appeal), the facts before us are such as to make it manifest that the verdict here cannot be supported by reference to any of the judgments in that case.

There are at least three grounds of difference which distinguish the present case unfavourably for the married woman from *Murray v. McCallum*.

The first is, that the husband is not in the receipt of wages, and so in a subordinate position. In the case in appeal the wife had partners who all agreed to pay the husband a fixed rate of wages. Here he got his means of his subsistence out of the profits of the business, as in *Petty v. Anderson*, 3 Bing. 179, (referred to in *Foulds v. Curtelett*, 21 C. P. 370), and he was free to help himself, and did help himself to spending money, taking \$5, and \$10 at a time, just as he pleased, without reference to the wife.

Another point of distinction is, that the husband intervened in the management of the business ostensibly as owner, though the wife says it was as her agent; he acted

in buying goods; in conducting correspondence; in keeping the books; in selling goods; in trading horses and cattle taken in settlement of store accounts, and generally in doing much as he could do in his apparently weakly physical condition. He is evidently possessed of more than average intelligence; he is much better educated than the wife, so that he could and did aid her materially in the conduct of the business. Much of what is said by the Judge in *Laporte v. Costick*, 31 L. J. N. S. 434, 23 W. R. 131, is of forcible application here.

The third point of prominence is, that the husband actually intervened in the particular transaction which led to the incurring of the debt which is now sought to be recovered. He wrote the letters and agreement put in, which form all the written evidence relating to the acquisition of the stock of goods from Hardy and the purchase of the store and house from the same person. The husband writes and contracts as if he was the owner of the property to be given in part in exchange, and the husband gives his own note for the balance of the price of the goods. The wife while directing the writing of the letters says she did not know their contents. It was her business to ascertain this, and prevent his so acting as to mislead persons with whom she was about to deal. Availing herself of his co-operation in carrying out the scheme of purchase she cannot reject those parts of the transaction which import that the husband was the principal. According to all the written evidence, penned by him as her agent, the husband figures as the sole principal, and the wife is not even named. It would be eminently unsafe to permit husband and wife to unite their testimony in contradiction of writings such as these, and so by uncorroborated oral evidence rescue property from the husband's creditors who swear that the writings represent the real transaction.

Regarding then this accumulation of adverse circumstances it is difficult to see how the verdict can be sustained. I cite the pertinent observations of Harrison, C.J.: *Harrison v. Douglas*, 40 U.C.R. 415, when speaking for the Court, he

says: "If the occupation or trade be such that the wife cannot carry it on without the husband's active co-operation or agency, it is not easy to discover in what sense it can honestly be called an occupation or trade carried on by her separately from her husband."

I think it is our duty to take advantage of rule 321 and of sec. 283 of R. S. O., cap. 50, and as was done in *Meakin v. Sampson*, 28 C. P. 383, and in *Hamilton v. Johnson*, 5 Q. B. D. 263, direct that the verdict be set aside, and that judgment be entered for the defendant. If costs are reserved by the interpleader order we think that all costs should be awarded to the successful party, except the costs of the application to a single Judge for a new trial, which should not be given to either party.

FERGUSON, J.—After having perused the evidence and exhibits, and examined the authorities, I am of the opinion that a judgment must be entered for the defendant on the issue. I think it clearly appears that the business was not carried on separately from the husband. I think he took part in the "conduct" of the business, and that the part he took was much the larger part. I also think with the learned Judge, before whom the issue was tried, that the business was actually the husband's business. I think *Hamilton v. Johnson*, 5 Q. B. D. 263, is a clear authority showing that the judgment may be entered for the defendant, although the finding was that of a jury. The English rule under which it was decided being the same as our rule 321.

I concur in the judgment of the Chancellor, and I think it would be supererogation to elaborate a judgment.

PROUDFOOT, J., concurred.

G. A. B.

[CHANCERY DIVISION.]

LAIRD V. PATON.

Reference as to title—When good title first shown—Registration of deed to vendor—When interest begins to run—Costs.

On a reference as to title under a judgment which contained this clause :

“And in case a good title can be made an enquiry when it was first shown that such good title could be made.” It was

Held, that these words meant when was a good title first shown upon the abstract.

Held, also, that a vendor does not complete his title until his deed is registered; i. e., that registration is essential to the title.

A purchaser becomes liable to pay interest, when no time is fixed by the contract, from the time when he could prudently take possession, and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made.

The ordinary rule in a vendor's suit is, that the costs are given against him up to the time when he has first shown a good title; but where the question as to title is not the chief matter in dispute the costs will follow the result.

Where a purchaser's objections to the title have caused the litigation and have been overruled, he will be liable for costs, notwithstanding any decision in his favour on particular points in dispute.

THIS was an appeal from the report of the Master in Ordinary.

The suit was originally brought before the Court in the form of a special case in which William H. Laird was plaintiff and Hugh Paton was defendant, for the purpose of getting the opinion of the Court as to whether the defendant could be compelled to carry out a contract made with the plaintiff for the purchase of certain lands from the plaintiff.

The contract arose out of several letters between the parties, in which the defendant agreed to purchase five lots, four of which were acquired by the plaintiff through a tax sale, and was to be carried out when the tax title had become perfected by the effluxion of the time within which under the Assessment Act it could be attacked.

Before that time had elapsed the plaintiff attempted to save time by making paper titles through the former owners to the four lots purchased at the tax sale; but was

unable to do so as to one of them, and the defendant rejected that title, and refused to carry out the purchase of that lot, and subsequently refused to carry out the purchase of the remaining four lots on the ground that the contract was indivisible, and that unless he got all the lots he was not bound to accept some of them.

The case was argued on the 2nd April, 1884, before Boyd, C.

J. R. Roaf, appeared for the plaintiff.

J. H. Morris and *Allan McNab*, for the defendant.

The learned Chancellor held that the parties had originally contracted with reference to a tax title, and that when the paper title offered was refused they were relegated to their original position, and on the expiry of the time necessary to confirm the tax titles which had expired on the 23rd February, last past (as was agreed upon the argument), the purchaser was bound to carry out the contract and a judgment was given against him for the specific performance of the contract for the purchase of all the lots, subject to a reference as to the title of the other lots if so desired.

On this reference it appeared that the deeds from the previous owners of the lots to the plaintiff, which were proposed to be used in making the paper titles, had been executed and left with the Bank of Toronto as *escrows* only, to be delivered up upon the considerations respectively therein mentioned being paid, (and which had not been taken up from the bank until the 12th May, 1884,) and that the two years which was necessary to make the tax titles good had expired on the 23rd February, 1884, but that as the title to lot 5 was not a tax title, the title to it could not be made good on the abstract, until the deed for it had been taken up and registered.

The Master found that a good title could be made to the lots in the special case mentioned: that good titles to all the lots except lot 5 could have been made on the

23rd February, 1884, and to lot 5 on the 12th May, 1884: that a good title to said lot 5 could not be shewn prior to said 12th May, because the deed from J. E. Withers et al. to W. Laird had not been registered prior to that date.

And at the request of the plaintiff he specially certified that the said deed had prior to the 1st January, 1884, been executed and deposited with the Bank of Toronto to be delivered to the plaintiff on payment of the consideration, and that the delivery and registration only of said deed was necessary to complete a good title to said lot.

From this report the plaintiff appealed, on the ground that the Master should have found that a good title to lot 5 could have been made on the 23rd February, 1884; and, the appeal, together with the hearing on further directions and the questions of costs, was argued before Proudfoot, J., on the 25th day of September, 1884.

J. R. Rouf, for the appeal. There is a difference between showing a good title and making a good title. The plaintiff here has shown a good title; *Seton* on Decrees, 4th ed., 1303. A good title is shown when the matters are set out in the abstract and is made when they are proved. *Kitchen v. Murray*, 16 C. P. 69; which will no doubt be referred to by my learned friend, is no authority in a case like this. Then as to the question of costs, there was a contest here as to whether the defendant could get out of the purchase and the reference as to title was only an incidental matter. There were five lots, and the title to four of them was made before action, and the other one was made good during the reference by the deed being taken up. Where the real contention in the cause is not a question of title, but one affecting the contract itself, or some collateral matter, the costs usually follow the event: *Morgan* on Costs, 183.

Allan McNab, contra. The Master was right in his finding that the title was not made when the deed was not taken up. The title was not deduced and made out until the deed was registered: *Kitchen v. Murray*, 16 C. P. 69. The title being a registered one, and the deed to the plain-

tiff being an essential link in the title, the plaintiff should have procured its registration: *Brady v. Walls*, 17 Gr. 704. The general rule in England is, that when an abstract of title has been demanded, and a vendor only makes out a good title after bill filed by him, he will be ordered to pay the costs of the suit: *Haggart v. Quackenbush*, 14 Gr. 701. So the defendant should get his costs here. The contract was an indivisible one, so the title to all the lots should have been made good, and the making good of some of them was not sufficient; and the plaintiff could not make title to all until the 12th of May, which was after action brought. The purchaser should not be held liable to pay interest on the purchase money until after that date as the deed was not taken up until then, and he could not prudently take possession until the deed was taken up and registered.

October 9, 1884. PROUDFOOT, J.—Appeal from the Master's report because he found that a good title could not be shown to lot 5, Savigny's survey, prior to 12th May, 1884.

The reason for the Master's finding was, that the deed from Withers and others to the plaintiff had not been registered prior to that date. The Master certified that the deed had prior to the 1st January, 1884, been executed by the parties to it, and deposited with the Bank of Toronto at Toronto, to be delivered to the plaintiff on payment of the consideration named in the deed, and that the delivery and registration of that only was required to complete a good title to the lot.

The judgment contained the usual reference "If a good title can be made, * * And in case a good title can be made an inquiry when it was first shown that such good title could be made."

Upon the materials before me I think the Master was right.

The meaning of the second branch of the reference, as explained in *Parr v. Lovegrove*, 4 Drew. 176, is, when was a good title first shown on the abstract; and if on the face

of the abstract the vendor has shown a title, and if for the purpose of supporting that title it is necessary to show that such a person died intestate, or any other fact,—if the facts are alleged with sufficient specification on the abstract,—then that abstract *shows* a good title, although the proof of the matters shown may be the subject of ulterior investigation.

The abstract has not been left with me, but it could not have shown the registry of the deed in question prior to the 12th May. And the decision in *Brady v. Walls*, 17 Gr. 699, is that the vendor does not complete title until deed registered, *i.e.* that registration is essential to the title.

The appeal on this subject is dismissed.

It was arranged that an order should also be made on further directions without another hearing. And two other questions were discussed, *viz.*, costs and interest.

The contract was by correspondence for five parcels of land, to four of which a good title was shown prior to action. In *Fry on Specific Performance*, s. 806, 2nd ed., it is said that, in equity, in the absence of special circumstances, a vendor is entitled to compel the purchaser of two lots to complete his purchase of the one, though he may fail in making out a title to the other. But this may be otherwise from the nature of the contract, or the property, without an express stipulation. And if there be an express agreement that the whole shall form one contract it will be deemed single. In the letter of 26th July, 1882, the vendor says he will sell the properties, mentioning them, "parties want to sell all together." And upon the basis of this offer the contract was completed. I think therefore the contract was indivisible, and that the purchaser was not bound to take any unless he got all.

A purchaser becomes liable to pay interest, when no time is fixed by the contract, from the time when he could prudently take possession, which is the time at which a good title is shown: *Carrodus v. Sharp*, 20 Beav. 56. The day when the title is made out in the Master's

office is the day on which the purchaser comes under an obligation to complete: *Fry* s. 1379. As I think the contract was not divisible the defendant could not prudently take possession until the title to the whole was made on the 12th May, 1884, and there being no stipulation in the contract to control the general rule, the plaintiff is entitled to interest from that date, and if any benefit has accrued to the vendor from the possession of the property after that, the defendant is entitled to it.

In this case the defendant refused to carry out the purchase because he supposed the title to lot 6 E White's survey was bad, and the contract being entire he could reject the whole. By the judgment the Chancellor determined that the title to this lot was good, and referred the question of the title to the others to the Master. And the title to all has been found good prior to the action, except lot 5, and the want of title to this lot was not the reason for refusing to complete the purchase. The defence, insisted on, was the right to rescind because the title to lot 6 E was bad. The defendant has failed in that. The plaintiff has succeeded in establishing that prior to action he had a title to all the lots, except one, and to that he also completed the title a short time after going into the Master's office.

In a vendor's suit the ordinary rule is, that costs are given against the plaintiff up to the time when he has first shown a good title: *Phillipson v. Gibbon*, 6 Gr. 434. But where the question of title is not the chief matter in dispute between the parties, the costs will as a rule follow the result. And where a purchaser's objections to the title have caused the litigation, and are overruled, he will be liable for the costs. And where the purchaser has by his conduct caused the litigation he will be liable for the costs, notwithstanding any decision in his favour on particular points in dispute: *Seton on Decrees*, 4th ed., 1312, 1313.

I therefore think that on all these grounds the defendant must pay the costs. The only question of title raised on the argument before the Chancellor was decided against

the defendant. The plaintiff showed a good title before action to all but one parcel. The conduct of the purchaser caused the litigation.

G. A. B.

[CHANCERY DIVISION.]

KAISER V. BOYNTON.

Legacy charged on land—Receipt—Legatee not bound to execute release—Costs.

J. B. being the owner of certain land, by his will, gave his son, M. B. a legacy of \$150 and charged it on the land, which he devised to his son W. B., an infant: with a provision that his son J. B. should occupy it during the minority of W. B., and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained \$150 of the purchase money because the legacy was not released; but by an agreement agreed to pay T. B. the \$150 as soon as he should furnish a release duly executed by M. B. The right to receive the \$150 under this agreement and any right he had to obtain this release was assigned by T. B. to M. K. M. K. having tendered a release for execution to T. B., who declined to execute it, brought a suit to compel him so to do.

Held, that although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered, still as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compellable to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do.

The purchaser should not have objected to the title on account of the legacy if there was proof of its being paid.

THIS was a motion for judgment in a suit brought by Mary Kaiser against Matthew Boynton, to compel the defendant to execute a release of a legacy, charged on land, which had been paid to him.

The facts as set out in the statement of claim fully appear in the judgment.

The motion was made on the statement of claim, as no statement of defence was put in, and was heard on the 29th October, 1884, before Boyd, C.

T. H. Bull, for the plaintiff.

No one appeared for the defendant.

At the conclusion of the argument the learned Chancellor gave a judgment in favour of the plaintiff, declaring that the legacy was paid ; but reserved the question of costs.

November 5th, 1884.—BOYD, C.—The defendant is legatee of \$150, which by the will of his father is charged on land devised by that will to his son William Boynton, then an infant, with a provision that another son John Boynton should occupy the land during the minority, and pay the said legacy. This land was thus occupied and the defendant's legacy paid by John Boynton on the 22nd September, 1878, and a receipt was then taken for that payment as was stated at the bar.

Afterwards William Boynton sold the land to Thomas Boynton, and Thomas Boynton, in 1879, sold the land to Joseph Chambers, who retained \$150 of the price because of the legacy remaining unreleased ; and by an agreement of 27th September, 1879, Chambers agreed to pay this to Thomas Boynton as soon as Boynton should furnish him with a release of the legacy duly executed by the defendant. Thomas Boynton, on the 13th May, 1884, assigned to the plaintiff all his right in the said retained \$150, and all his right to a release of the said legacy.

On 5th May, 1884, the plaintiff caused a release of the legacy to be tendered to the defendant for execution, and he then, as it is pleaded, wrongfully refused to execute it, and hence this action, which is not defended. While I gave the plaintiff judgment declaring that the legacy was paid, which may be registered, I was doubtful whether it was a case for costs. I reserved that point.

The defendant has done nothing wrong and there does not appear to be any privity between him and the plaintiff. There was nothing to shew that the defendant was aware of the plaintiff's position, and he had no dealings with her about this legacy, so far as is pleaded. He gave a receipt to the person who paid him in 1878, and was he bound to do anything more in 1884 ?

In re Roberts' Trust, 17 W. R. 639, it was decided that

executors are not entitled to ask for a release and indemnity from legatees—all they can claim is a receipt for the money. The same was held *In re Fortunes Trusts, Ex p. Brennan*, Ir. Rep. 4 Eq. 356.

In re Cater's Trusts, 25 Beav. 367, Romilly, M. R., says: "I think that when money is due to *cestuis que trust* who have settled it, the trustee is entitled to a release from the *cestuis que trust*, but to a receipt only from the persons to whom they desire it to be paid." This would not imply a release under seal necessarily, as appears from the cases of *King v. Mullins*, 1 Drew. 308, and *Re Wright*, 3 K. & J. 419.

That the legacy is charged on land does not in principle make any difference. In 2 *Prideaux* on Conveyancing, 11th ed., p. 610, is given the form of receipt for a legacy charged on land, and in the notes it is said: "If the real estate is charged with a legacy and not with debts, * * it is apprehended * * that the devisee cannot make a good title without proving payment or a release. If the legacy is paid a simple receipt is sufficient, but if it is released without payment there should be a formal deed." It does not appear from the pleading in this case that the title is a registered one, if even that would make any difference.

My conclusion is, that the legatee, having given a receipt, is not to be compelled to sign anything else. Of course, as said by the Vice Chancellor, in *Chadwick v. Heatly*, 2 Coll. C. C. 141, the question is not whether it would not have been a reasonable and perfectly harmless course to execute such a deed, but whether I am to punish a man by making him pay costs for not doing that which he was not in law bound to do.

There will be no direction as to costs.

As was said in *Ex p. Rolls*, Jur. 1864, p. 157, by Bramwell, B., in an analogous case, I do not think the purchaser should have objected to the title on account of the legacy, if there was proof of its being paid.

G. A. B.

[CHANCERY DIVISION.]

GILLEN V. THE ROMAN CATHOLIC EPISCOPAL CORPORATION
OF THE DIOCESE OF KINGSTON IN CANADA ET AL.

*Mortgage—Custody of—Authority to receive mortgage money—Agency—
Adoption of payments*

Held, that custody of a mortgage gives no right to the custodian whether he be the solicitor of the mortgagee or not, to receive any part of the principal or interest secured. A mortgage not only secures money, but it affects the land, and so for its effectual discharge not only payment but re-conveyance is essential, and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security.

G., a mortgagee, left her mortgage in the office of M., her solicitor. F., the mortgagor, paid the interest and \$3,000 on account of principal to M., who paid over the interest, but retained the \$3,000, of which the mortgagee knew nothing. F. subsequently paid a further sum of \$1,500 on account of principal, and other sums of interest, all of which were paid over to G.

Held, that there was no implied authority to receive the principal, and that the adoption of a later payment of principal could not of itself be held to ratify the prior unknown payment.

THIS was a mortgage suit brought by Hannah M. Gillen (mortgagee) against the Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada and the Right Reverend James Farrelly.

The Corporation were made parties as owners of the equity of redemption, and the defendant Farrelly was the mortgagor.

The defence set up was that certain payments of principal and interest had been made to one E. McMahon, who was alleged to be the agent and solicitor of the plaintiff and to have had authority to receive the same; and the defendants claimed to be entitled to credit for said payments.

The case was tried at Belleville on the 10th of October, 1884, before Boyd, C.

The evidence showed that the payments had been made to McMahon, who was the regular solicitor for the plaintiff, and in whose office the mortgage was kept: that the payments of interest had been duly received by the plaintiff: that a sum of \$3,000 paid as principal on January 10th,

1883, had never been paid to the plaintiff; but that a sum of \$1,500 subsequently paid on account of principal and various payments of interest, subsequently made, had been duly paid to her. The question in dispute was, whether McMahon was the duly authorized agent of the plaintiff for the purpose of receiving the money; and it was contended that the receipt by the plaintiff of the payment of the \$1,500 principal and the payments of interest, subsequently made, was an adoption by her of the \$3,000 payment previously made.

Cassels, Q. C., for the plaintiff. The whole question is, was McMahon the agent of the plaintiff to receive the \$3000. I contend that he was not. Agency must be strictly proved: I refer to *Pole v. Leask*, 9 Jur. N. S. 828; *Greenwood v. The Commercial Bank of Canada*, 14 Gr. 40; *Palmer v. Winstanley*, 23 C. P. 586; *Moody v. Tyrrell*, 6 P. R. 313; *Withington v. Tate*, 4 Ch. 288; *Wilkinson v. Candlish*, 5 Ex. Ch. 97; *Bourdillon v. Roche*, 27 L. J. Ch. 681-4.

Moss, Q. C., and *Burdett*, for the defendants. All the combination of circumstances justifying the payment to McMahon are found here. He had the custody of the security, and although the evidence as to the direction by the mortgagee to pay him is conflicting, still we contend the balance is in defendant's favor. There is also evidence of acquiescence by the mortgagee.

October 22, 1884. BOYD, C.—The law is well settled in this country that the custody of a mortgage upon land gives no right to the custodian, be he solicitor of the mortgagee or not, to receive any part of the principal or interest secured. The mortgage not only secures money; but it also affects the land, and for its effectual discharge not only is payment of the money an essential, but equally essential is it that the estate should be reconveyed. For this reason the law does not infer a right to receive the money from the mere possession of this kind of security:

Wilkinson v. Candlish, 5 Ex. Ch. 91; *Sims v. Brutton*, *Ib.* 809; *Withington v. Tate*, L. R. 4 Ch. 288.

No dispute arises in this case as to the interest, which was paid to the solicitor and received by the client, nor as to the subsequent payment of part of the principal which was also transmitted to the client by the solicitor; but the question is, who is to lose a sum of \$3000 of principal money retained by the solicitor and paid him in good faith by the defendant. This payment was made to a clerk in the office of the solicitor, on January 10th, 1883, and by that clerk deposited in the bank to his master's credit. But the mortgagee had no notice of it till after the solicitor's death, which was in February, 1884. A further payment of \$1,500 on account of principal was made to the solicitor on January 12th, 1884, and duly accounted for forthwith to the plaintiff, and various payments of interest were also made to the solicitor and properly paid over to the plaintiff. An argument was based upon these facts that an implication of agency to receive the principal arose from the manner of dealing. I do not think this argument can be supported. Authority to receive the interest may be conceded, but it does not impart authority to receive the principal. The adoption of the last payment of principal cannot be held to rectify a prior unknown payment, unless possibly it could be shewn (which it was not) that there was the intention to adopt all payments made to the solicitor, or that the position of the mortgagor was altered for the worse; *Kent v. Thomas*, 1 H. & N. 473.

That then reduces the matter to the conflicting evidence of what occurred when the sale was completed, and the mortgage was executed in the solicitor's office. I may observe in passing, that the evidence falls far short of establishing that the functions of the solicitor were, in the business transacted for the plaintiff, at all analogous to those of a scrivener as defined in the old cases. He was not, in this instance, retained or employed to invest, to receive, and to re-invest the money of his client.

[The learned Chancellor then reviewed the evidence,

which it is thought unnecessary to report, and found as follows:]

I find that the burden lay on the defendant to prove the agency of McMahon to receive principal money, and I cannot find upon the whole of the evidence that he has succeeded in establishing that agency.

G. A. B.

[QUEEN'S BENCH DIVISION].

REGINA V. JAMIESON.

Lottery Act—Giving prizes for guessing number of buttons in glass jar—quashing conviction—Costs.

The defendant placed in his shop window a globular glass jar, securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number of buttons in the jar a pony and cart, which he exhibited in his window, stipulating that the successful one should buy a certain amount of his goods.

Held, that as the approximation of the number of buttons depended upon the exercise of judgment, observation, and mental effort, this was not a "mode of chance" for the disposal of property within the meaning of the Act.

Quære, whether defendant should not get the costs of quashing conviction made to test the law in such a case.

November 18th, 1884. This was a motion by *Armstrong* to quash a conviction by the Police Magistrate at Toronto, for "that Philip Jamieson, on the 3rd day of July, 1884, at the city of Toronto, did unlawfully advertise and publish a proposal, plan and scheme for giving and disposing of personal property, to wit, clothing and furnishings, and a Shetland pony, and also a chaise, harness and whip, cushions, lamps and mats, by a mode of chance called "semi-centennial gift enterprise," at the Horticultural Gardens, in said city of Toronto, against the form of the statute in such case made and provided.

The evidence was brief, and as follows:

James Watson said that he was a county constable and knew the defendant, who was a clothier and tailor, having his place on the corner of Yonge and Queen Streets, in Toronto: that on the 3rd July he was at defendant's shop, and had some conversation with him, when he gave him the handbill containing the advertisement; that he saw the buttons, which were of all different kinds and sizes, patterns and shapes: that he saw the book, which defendant showed him, and in which the names were to be registered: that the glass vase was about half full, and was exhibited in a window, and the defendant said at the time of the exhibition the buttons would be counted: that he saw the Shetland pony and the rig in the window, where all could see it, and there was a notice in the window to the same effect as the notice given: that the names of N. C. Love, H. Piper, H. J. Rose, T. C. L. Armstrong, and Edward McKeown were advertised as being the gentlemen who had sealed the vase and put in the buttons: that the vase nearly held a hat full of buttons, of which there were hundreds, not millions, but how many there were he could not tell.

George Jaffray said that his son obtained the prize of the pony and cart in question: that he had bought some clothing, some \$5 in value, and put in his guess: that he guessed 4599, the real number being 4593: that his guess was the nearest: that his son was about ten years old: that he made a calculation for him: that he (defendant) had a vase as near as possible the same size and shape, and got a quantity of buttons as near as he could of like character, and that he then calculated by his eye as closely as he could how many it would take to fill the vase to the same extent, and he came to this conclusion that there would be from 4500 to 4600: that he never expected to hit the exact number: that the buttons were of various sizes and shapes, the 200 or so buttons being as much as possible like those in the vase: that the vase he used was much the same shape in the bottom, but of a different depth, the diameter being, he thought, the same: that his

first guess, looking at the vase, was that there would be about 2500 buttons.

Max J. Meyerfrey said that he heard defendant say the guesses ran from about 200 to about 50,000, but was not positive.

Fenton, County Crown Attorney, contra, submitted that this case was distinguishable from the *Dodds Case*, 4 O. R. 390 : (1) Because this defendant had personal property, the clothing in his shop to dispose of, and was attempting to do so by this means. (2) That the specific prize to be given by defendant, a Shetland pony and carriage, &c., had been set apart and exhibited in his shop window. (3) The evidence showed that the buttons to be guessed at (unlike the beans in *Dodds's Case*) were of all shapes, sizes, and descriptions, and it was impossible by any process of skill or judgment to estimate their number—that even if the guesser happened to guess the exact number it was the merest chance : that by the scheme it was not pretended the number could be ascertained by any computation, the prize was to be given to the party making the nearest guess. He cited *Hudelson v. State*, 5 Crim. Law Mag. 524, decided in April, 1864, in which the Supreme Court of Indiana decided that a scheme for guessing at the number of beans contained in a glass globe was a mode of chance and lottery, and he submitted that the reasoning of the Indiana Court was unanswerable, and shewed that the case of *The Queen v. Dodds* was wrongly decided.

Armstrong, for defendant, contended that the Court was not bound by the decision in the Indiana Court, but was bound by the *Dodds Case*, and that there was no difference in kind but only in degree between the *Dodds Case* and the present case.

November 20th, 1884. ROSE, J.—It is attempted to distinguish this case from *Regina v. Dodds*, 4 O. R. 390, in that in this case the prize or article advertised to be given away was existing and ascertained at the time of the

guessing or estimate, and was the personal property to be disposed of within the meaning of the statute.

As I understand the judgment of the learned Chief Justice in that case, he decided that the newspaper which the defendant was advertising and not the prize, was the article to be disposed of.

The defendant is here convicted for disposing of the prize, as well as certain clothing.

The learned Chief Justice rested his judgment on the ground that the newspaper which was there advertised was not existing personalty; but also stated a second ground, viz, that nothing was done by lot or chance. He said: "The articles (the beans) were exhibited visibly in a glass jar to all parties, and each person was to exercise his judgment as to the number, and put the result of his opinion on his ticket or coupon. It was a chance, no doubt, in a sense that it would be difficult to most minds to make a really near approximation to the truth, but others might from training or turn of mind, or accuracy of observation and facility of mental arithmetic, applied to the visible size and capacity of the vessel, make a more or less accurate estimate of the contents." Armour and Cameron, JJ., rest their judgments on this point. I am unable to distinguish this case. The evidence shews an estimate. The fallacy of the argument for the Crown seems to me to be that because the estimate may not be exact it is therefore no estimate, but a mere chance method.

The number to be ascertained is a certain definite and ascertainable fact. Nothing can remove it to the region of uncertainty. The opening of the jar and counting of the buttons will ascertain the fact. If a mistake is made in counting the fact would still remain, and no one would say that a person who from habits of mental carelessness frequently made mistakes in the counting was ascertaining the number by a method of chance.

The jar being closed, the fact that the buttons were of unequal size and different shapes renders the estimate less accurate and more difficult; nevertheless, it is an esti-

mate, a calculation, an endeavor to ascertain a fact by mental process, rendered more or less certain by a variety of circumstances.

The throw of the dice, the turning of the wheel, the shuffling of the cards are all modes of chance. No mental process, no mode of calculation, no estimate will enable us to arrive at the result. The result is not a certain, definite, ascertainable fact by any controllable method. It is uncertain, doubtful. No human mind knows or can know what it will be until the dice are thrown, the wheel stops its revolution, or the dealer has thrown out the cards.

Mr. Fenton cited *Hudelson v. State*, Criminal Law Magazine for July, 1884, p. 524—a decision of the Indiana Supreme Court. This is not binding upon me, although entitled to every consideration. I am bound by *Regina v. Dodds*. The reasons upon which the decision rests in the *Hudelson Case* I cannot think quite sound.

When the learned Judge Zollars admits that “an expert mathematician might more nearly fix the size of the globe than an entirely uneducated person,” and that “he and persons of better judgment might more nearly fix the number of beans in the globe” than persons of less judgment, it seems to me, with great deference, he cedes the case, and removes the question from the region of chance to that of calculation and estimation.

I see no difference in the fact that the buttons were of uncertain size and shape. So were the beans. Nor that those in the centre were unseen. So also were the beans. This renders the estimate more difficult; but on that ground it does not cease to be an estimate.

For these reasons I am of the opinion this conviction must be quashed.

If a similar tentative conviction is brought before the Court it will be a question for consideration whether in the event of its being quashed costs should not be awarded. It does not seem just that the defendant should have to pay the costs of motions made to settle the law for the benefit of the public.

Conviction quashed.

[CHANCERY DIVISION.]

LONG ET AL. V. HANCOCK ET AL.

Fraudulent preference—Pressure—R. S. O. ch. 118.

The H. Company being indebted to the plaintiffs in about \$4,750, application was made by letter and verbally by the latter, insisting upon payment or security. The company, which to the knowledge of the plaintiffs, was hopelessly insolvent, thereupon gave a chattel mortgage to the plaintiffs, covering all their available assets. The mortgage recited that the plaintiffs had agreed to loan the company \$5,000 on the said security, but the arrangement was that the plaintiffs should deduct the amount of the debt due them out of the pretended loan.

Held, that the above was a fraudulent preference, and there was no such *bonâ fide* pressure as exempted the case from the provisions of R. S. O. ch. 118.

THIS was an interpleader issue. William D. Long and George H. Bisby, plaintiffs, affirmed, and Edward H. Hancock, J. B. Fairgrieve, and John Hallam, defendants, denied that certain goods and chattels consisting of the machinery, stock, goods and chattels of the Hamilton Knitting Company (Limited) enumerated in a chattel mortgage given by the said company to the plaintiffs, and dated May 5th, 1883, seized in execution by the sheriff of Wentworth, under certain writs of *fieri facias* issued upon judgments recovered by the defendants respectively, were, or some part thereof was, at the time of the said seizure, the property of the plaintiffs as against the said defendants. The writs of *fieri facias* above referred to were all issued in June, 1883.

The issue was tried at the Chancery Sittings at Hamilton, on October 1st, 1883, before Boyd, C.

The evidence shewed that the Hamilton Knitting Company, being indebted to the plaintiffs for a large overdue account, application was made by letter and verbally on the part of the plaintiffs for payment or security, and the following letters were put in evidence:

HAMILTON, Ont., April 16th, 1883.

O. C. SWEET, Esq., Manager H. K. Co., City.

Dear Sir,—We do not care to wait longer for the settlement of our account. If it is not closed up this week shall place it in our attorney's hands for collection.

Yours truly,

LONG & BISBY.

HAMILTON, Ont., April 26th, 1883.

HAMILTON KNITTING Co., City,

Gents,—We enclose you statement of account to date, shewing balance due us of \$4767.50. We want this paid at once or security given. We have been very indulgent in this matter. We must now insist on a settlement.

Yours truly,

LONG & BISBY.

Accompanying this was a memorandum in which Long & Bisby offered to take a mortgage on all the plant, tools, and machinery of the Hamilton Knitting Company, securing the payment of their claim of \$4767.50, payable in the manner therein specified.

Accordingly the chattel mortgage in question was executed. It was made between the company as mortgagors and the plaintiffs as mortgagees, and recited as follows:

Whereas the mortgagors are indebted to the mortgagees in the sum of \$4750, or thereabouts, which matured in the month of November now last, and whereas the said mortgagees frequently demanded payment thereof, but the mortgagors were and are unable to pay the same, and whereas the mortgagees have agreed to loan the mortgagors the sum of \$5000 on the security of the property hereinafter described, payable as herein stipulated, and whereas on the 27th day of April, 1883, the board of directors of said company passed a by-law authorising a mortgage to the mortgagees of the property herein described as security for said loan," &c., and proceeded to assign to the mortgagees all the available assets of the company.

The verbal evidence adduced did not carry the pressure further than shewn by the above two letters (a).

The rest of the facts of the case appear from the judgment of Boyd, C.

J. Muir, for the plaintiffs. The meaning of R. S. O. ch. 150, sec. 30, sub-sec. 2, is in question. The sub-sec. does not require a by-law, nor is there anything requiring a by-law to be under seal. Every shareholder assented to what

(a) This assertion is made on the authority of the learned Chancellor.

was done in this case. It was a *bond fide* transaction, and there was such pressure as prevents it being regarded as a fraudulent preference: *Brayley v. Ellis*, 1 O. R. 119 ; 9 A. R.

E. Martin, Q.C., and *E. Furlong*, for defendant Hancock. The whole transaction is a sham, it is not a loan by the plaintiffs to the Knitting Co., but the taking by the plaintiffs of a security for their debt; no advance was made: *Scales v. Irwin*, 34 U. C. R. 545 ; *Graham v. Chapman*, 12 C. B. 85 ; *Ex parte Hauxwell*, 23 Ch. D. 626, at p. 638. The Knitting Co. cannot under the terms of their charter give security for a past due debt. The mortgage is void as a fraudulent preference under R. S. O. ch. 118, and the doctrine of pressure cannot apply, as the plaintiffs were aware of the desperate condition of the affairs of the Knitting Co.: *The Meriden Silver Co. v. Lee and Chillas*, 2 O. R. 451 ; *Ex parte Hall*, 19 Ch. D. 580. The proper consideration is not shewn in the mortgage, and the object was to mislead the creditors by keeping the true state of affairs concealed.

Tilt, Q. C., for the defendant, J. Hallam, referred to *Hamilton v. Chaine*, 7 Q. B. D. 319 ; *Bank of Montreal v. McTavish*, 13 Gr. 395.

A. D. Cameron, for the defendant Fairgrieve.

October 10th, 1883. BOYD, C.—The Knitting Company was indebted to the plaintiffs for a large overdue account amounting to \$4,750, and application was made by letter and verbally on the part of their creditors for payment or security. This is the pressure which is relied upon to exempt the case from the provisions of the statute relating to fraudulent preferences. This pressure, however, resulted in the accomplishment of neither alternative. It is conceded on the face of the impeached instrument, and it is the fact that the company was unable to pay, and they were equally unable under the disabilities imposed by their charter to give security for a past due debt. This being so, another scheme is devised, which is originated by the president of the company, whereby a loan of \$5,000 is to

be made by the plaintiffs to the company, out of which the company is to pay back \$4,750 in satisfaction of the plaintiffs' debt. The form of lending is gone through so that the provisions of the Chattel Mortgage Act and of the Act relating to Joint Stock Companies can be complied with. But the pith of the transaction was, the giving of all the practically available assets of the company to the plaintiffs in security for their debt. Now, when this was carried out both parties knew the desperate condition of the company; all the machinery and chattels of the company which were worth anything had been taken over by one creditor with the knowledge that no assets were left to the company to satisfy other creditors. If this particular creditor was not content to accept what was offered by the company, he was told that an assignment for the benefit of creditors was the only other alternative. The doctrine of pressure is not to be extended—it has gone already to a length which approximates to absurdity; and I think the proper conclusion from the facts of this case is that there was no *bondâ fide* pressure which induced the giving of this security, but that it was by the device of a moribund company to prefer the plaintiffs to the other creditors as all parties very well knew and designed.

This is the view which I had formed at the close of the argument. Further consideration and a perusal of the cases *Ex parte Hall*, 19 Ch. D. 580; *Ex parte Griffith*, 23 Ch. D. 69, and *Ex parte Boon*, 41 L. T. N. S. 42, has confirmed my opinion that the issue must be found in favour of the defendants.

A. H. F. L.

(a) See *Slater v. Oliver*, p. 158.

[CHANCERY DIVISION.]

SLATER V. OLIVER ET AL.

*Creditor's action—Fraudulent preference—Pressure—R. S. O.
ch. 118, sec. 2.*

Where it was sought to set aside a bill of sale of personal property as fraudulent and void, as against the creditors of the grantor, and the evidence shewed that it was reluctantly given by the debtor, who only yielded after some delay, and to a continuous insistence on the part of his creditor, his intent being to escape his creditor's importunity, and that the demand of the creditor was made *bonâ fide*, with no intent but to obtain the security, which she was advised she ought to have.

Held, affirming the decision of Proudfoot, J., that the bill of sale was not void under R. S. O. ch. 118, sec. 2.

Under the above section the intent with which the conveyance, or gift in question was made, must be looked at, and if it was obtained as the result of honest pressure on the part of the creditor, that rebuts the presumption of an intent on the debtor's part to act in fraud of the law.

THIS was an action brought by George T. Slater, who sued on behalf of himself and all the other creditors of one R. Douglass, against Martha Elizabeth Oliver and the said R. Douglass, claiming to have a certain bill of sale of certain goods, chattels, book debts, and other personal property, declared to be fraudulent and void as against himself and the other creditors of the defendant Douglass, and set aside and cancelled, and in default of payment of his claim and costs of suit that the said personal property might be sold, and the proceeds applied in payment of the plaintiff and the other creditors according to their priorities.

The defendants put in a joint defence denying that the transfer in question was made for the purpose of defeating, defrauding, or delaying the plaintiff or any other of the creditors of Douglas, stating the circumstances under which the bill of sale was given, which sufficiently appear in the judgment of Osler, J. A., and stating that the transfer was made in good faith and for a valuable consideration, and without any fraudulent or improper intent or design on the part of the defendants or either of them.

The action was tried at Toronto on December 14th, 1882, before Proudfoot, J.

J. H. Macdonald, for the plaintiff.

C. Moss Q. C., for the defendants.

December 24th, 1882. PROUDFOOT, J.—I cannot say I entertain any doubt on this case, in considering it in accordance with decisions as now existing. At one time it was held that pressure was no longer a defence, and *Davidson v. Ross*, 24 Gr. 22 (a), and cases of the kind, held that under insolvent law it mattered not whether the creditor pressed for his debt or not; all that was to be considered was, whether there was an equal distribution of assets, and they therefore held that no matter how much a creditor might be insisting upon payment of a debt the debtor had no right to make over to the creditor, and the creditor had no right to receive, anything that would give him preference over the other creditors. The law is now changed and it has been determined otherwise by several recent cases. *Brayley v. Ellis*, 1 O. R. 119, which has been referred to, was the case which I followed recently. When the act of the debtor does not arise from his own spontaneous motion, but is the result of an application by a creditor who is pressing for and desirous of getting payment of his debt, that will save the transaction from offending against the statute. Now I confess that all the circumstances connected with this case lead me to believe that there was no fraudulent pressure, the pressure was not brought to bear with any fraudulent intent. The whole manner in which the debt became the property of Mrs. Oliver, and the mode in which the negotiations were carried on for the payment of the note, giving security, as it is termed, or getting property in payment, all seem to me to show that there was a *bond fide* wish on the part of Mrs. Oliver to get payment for her debt, and that in doing so she was not influenced by any desire to obtain a preference or to defraud the other creditors, but was influenced by the advice she received

(a) See the remarks on this case in the recent case of *McCrae v. White*, 9 S. C. R. 22, so far as it decided that the doctrine of pressure was inapplicable to transactions arising under the late Insolvent Acts.

from her cousin, Mr. Oliver, and from her solicitor—that the debt ought to be secured; that all debts by persons in business were, to a certain extent, hazardous; and that she ought to be suing him; that she was not in a position to look after business herself very well; that this ought to be properly secured. That it was in consequence of this that she brought the pressure to bear on her step-brother; that although there was no direct communication between them on the subject, still that she had instructed her father and instructed her solicitor to take all steps necessary for securing her payment of this debt; that they did so; that the father informed Douglass that he would have to secure this or that he would be shut out so that proceedings would be taken against him; and to the same purport was the communication made from the solicitor to Crozier, the father.

I think, on the whole, considering the nature of the recent decisions, I must hold the plaintiff has failed to make out any case for setting aside this preference. If I had thought otherwise, I should have thought it necessary to make some remarks on the fact of this bill being a second bill for the same purpose. There seems to have been an action brought in this Division for the recovery of this debt against Douglass, and then a new bill filed against Douglass and Mrs. Oliver, for the purpose of setting aside this conveyance. I think that is not according to the recognized principles of the Court. The defendant Oliver ought to have been made a party by amendment to that proceeding, in place of going through all the process of a new suit. However, it is not necessary to say anything further about that in this case.

I dismiss the bill, with costs.

Afterwards, on February 21st, 1884, the plaintiff moved, by way of appeal, from this decision to the Divisional Court.

J. H. Macdonald, for the appellant, cited *Ex parte Hall*, 19 Ch. D. 580; *Ex parte Griffith*, 23 Ch. D. 69; *Ex parte Hill*, *ib.* 695; *Segsworth v. Meriden Silver Plating Co.*, 8 O. R. 413; *Martin v. McAlpine*, *ib.* 499, S. C. in App. 19 C. L. J. 296; *Lumsden v. Scott*, 4 O. R. 323; *Meriden Silver Co. v. Lee*, 2 O. R. 451.

C. Moss, Q. C., contra. Mrs. Oliver was advised to secure herself as a matter of business. She threatened to sue Douglass if he did not give the security. There was much stronger pressure here than has heretofore been held sufficient to rebut the presumption of fraudulent preference: see *Keys v. Brown*, 22 Gr. 10, cited in *Davidson v. Ross*, 24 Gr. 22. There was an entire absence of any intent to protect the debtor or defeat the claims of other creditors. The plaintiff here only seeks to secure himself, being a judgment creditor with execution: see *Alton v. Harrison*, L. R. 4 Ch. D. 622; *Davis v. Wickson*, 1 O. R. 369; *Young v. Christie*, 7 Gr. 312; *McKenna v. Smith*, 10 Gr. 40; *Brown v. Sweet*, 7 A. R. 725. The American cases are very strong: see *Curtis v. Leavitt*, 15 N. Y. 196; *Powers v. Green*, 14 Ill. 386; *Ford v. Williams*, 8 B. Mon. (Ky.) 550. The recent English cases depend upon their own circumstances. I refer as to the book debts to *McNaughton v. Webster*, 6 C. L. J. O. S. 17.

March 13th, 1884. OSLER, J. A.—The plaintiff sues on behalf of himself and others the creditors of the defendant Douglass to set aside as being fraudulent and void as against them a bill of sale given by Douglass to the defendant Oliver of his goods and chattels book debts and other personal property. The defendant Oliver is the widow of Stephen Oliver, to whom at the time of his death the defendant Douglass was indebted in a considerable sum. By his will Oliver directed that his widow should be paid in lieu of her dower such sum as the executors should determine, and in part satisfaction of such sum the executors assigned to her the debt in question. She was advised by her brother-in-law and her

father to insist upon obtaining from Douglass some security for it, and her claim was placed in her solicitor's hands, with instructions to that effect. These instructions were acted on, security was demanded, with the alternative of an action being brought for the debt, and Douglass being sold out. The evidence seems to me, as it did to my Brother Proudfoot, amply sufficient to shew that the bill of sale was reluctantly given by the debtor, and that he only yielded after some delay and to a continued insistence on the part of his creditor. The demand of the creditor was made in good faith, and with no intent on her part but to obtain the security which she was advised she ought to have. The effect of it undoubtedly was, to deprive the debtor of the means of paying his other creditors, but his intent in giving it was, I think, to escape his creditor's importunity. It seems to me quite clear that it would not have been given but for the latter's unequivocal and pressing demand. I think this case quite distinguishable from *Ex parte Wheatly, re Grimes*, 45 L. T. N. S. 80, on this ground. My brother Proudfoot following the decision in *Brayley v. Ellis*, 1 O.R. 119, and former cases on the doctrine of pressure, held that there had been in this instance pressure of that kind which was held to validate a mortgage or other security given by a debtor as rebutting any inference of a fraudulent intent. The case of *Brayley v. Ellis*, 1 O. R. 119, having now been affirmed by the Court of Appeal, 9 A.R. 565. although that Court was equally divided, there is no reason for longer delaying the judgment which we said we were prepared, but for the pendency of the appeal, to give at the close of the argument.

In *Davidson v. Ross*, 24 Gr., at p. 83, Moss, J. A., thus states the result of the authorities up to that time on this subject: "By a long series of decisions it has been settled that no particular degree of pressure is required. A mere request if proved to have operated on the debtor's will is held sufficient." Mr. Macdonald urged very strongly that the recent cases of *Ex parte Griffith*, 23 Ch. D. 69, and *Ex parte Hill*, 23 Ch. D. 695, had in effect overruled the

former authorities in England on the doctrine of pressure as applied to transactions under the Bankruptcy Act of 1869, and that these cases should now be adopted by us as affording the rule of construction of our Fraudulent Preference Act, R. S. O., ch. 118, instead of following the former decisions of our own Courts on the subject.

I do not regard *Ex parte Griffith* and *Ex parte Hill* as determining anything contrary to decided cases. No doubt the Lords Justices do express dissatisfaction at the length to which some of them have gone, and a desire, to use the language of Lord Justice Bowen, to go back to the words of the statute. Whether an Appellate Court is at liberty to do this in disregard of its own former decisions placing a construction in the words of the statute, it is not for me to say. I only desire to point out that whatever inference may be drawn as to the individual views of the Lord Justices, they did not overrule those former decisions, and determined only that on the facts of the cases before them there was no honest pressure. It is impossible to argue that anything said in *Re Griffith* has overruled either *Ex parte Topham*, L. R. 8 Ch. 614, or *Ex parte Tempest*, ib. 6 Ch. 70, when we find in *Butcher v. Stead*, L. R. 7 H. L. 839, better reported in 25 W. R. 463 and 33 L. T. N. S. 541, Lord Cairns using such language as this, "The Act appears to have left the question of pressure as it stood under the old law, and indeed the use of the word 'preference' implying an act of free will, would of itself make it necessary to consider whether pressure had or had not been used, and this appears to have been the opinion of the Lords Justices in the case of *Ex parte Topham*, L. R. 8 Ch. 614." And Lord Selborne says, "The old law as to the effect of pressure by the creditor remains unchanged." (In the Law Reports and Law Journal Reports, the expression is *preference* by the creditors; which is clearly a misprint).

It may be observed that this case is not referred to in *Ex parte Griffith*, 23 Ch. D. 69, and though cited by counsel in *Ex parte Hill*, ib. 695, is not noticed in the judgment, which

is based on the ground that the transaction in question was, "a sham, a farce, and a gross fraud."

In *Tomkins v. Saffery*, 3 App. Cas. 213, dealing with the construction of the 92nd section of the Bankruptcy Act, 1869, Lord Cairns says, p. 225, that he accepts without the slightest hesitation as a statement of the law the argument of the appellant's counsel, that if the payment there in question was made under pressure it was the pressure that was to be looked to, and taken as the *causa causans* of the payment, and not any intention of giving a preference to particular creditors. Lord Blackburn says, p. 235, "It was argued very ably by Mr. Herschell, and I think to some extent my mind goes with his argument, that when this section speaks of a payment with a view to give a preference over other creditors, we must see whether it was a payment made under such circumstances as would under the old Bankruptcy law have been considered a preference and a fraud in a bankruptcy."

This case was not referred to in either of the cases in 23 Ch. D.

In *Ex parte Helder, in re Lewis*, 24 Ch. D. 339, Brett M. R., in a Court composed of himself and Lords Justices Cotton and Bowen says, (p. 343.) "It seems to me that those who seek to charge the solicitor with the money are bound to show that the payment was a fraudulent preference. It could only be that if it was made without pressure by the creditor, and to my mind it has not been shown that it was so made. A request by the creditor for payment would be enough."

The three cases I have mentioned are not referred to in *Brayley v. Ellis*, in appeal.

The language of the 92nd section of the Bankruptcy Act of 1869 is, "Every conveyance, &c., made by any person unable to pay his debts, in favor of any creditor, with a view of giving such creditor a preference over the other creditors, shall be deemed fraudulent and void as against the trustee in Bankruptcy" &c. ; and the authorities I have quoted justify me in saying, notwithstanding anything in the

cases in 23 Ch. D., and notwithstanding what is said by Sir James Bacon, C. J. in *Ex parte Wheatley, supra*, that "if the mere fact of pressure were sufficient, there was no doubt abundant pressure put upon the debtor, but that was not the law as it stood," I repeat I am justified in concluding, that even under the terms of this section the question of intent is still the main ingredient, and that if there be honest pressure on the part of the creditor, though it be no more than arises from an unequivocal demand, it is sufficient to prevent a transfer, payment, &c., from being deemed a fraudulent preference.

The doctrine of pressure thus applied to transactions under that Act appears to me to be applicable to its full extent to those arising under our own R. S. O. ch. 118, sec. 2: "In case any person being at the time in insolvent circumstances, or unable to pay his debts in full, * * makes any gift, conveyance, &c., with intent to defeat or delay the creditors of such person, or *with intent* to give one or more of the creditors of such person a preference over his other creditors * * every such gift shall be null and void as against the creditors of such person."

We are here plainly required to look at the intent with which the conveyance, gift, &c., was made, and if there be honest pressure on the part of the creditor, that rebuts the presumption of an intent on the debtor's part to act in fraud of the law: *The Bank of Toronto v. McDougall*, 15 C. P. 475.

Even, however, if I thought there was more doubt than I do as to the present state of the law in England upon this subject as applied to transactions arising under the Bankruptcy Act of 1869, I should not think it right for that reason to ignore a construction which has been so long placed upon our own statute, supported as it is by a weight of judicial authority not to be lightly disregarded by any Court; and affirmed, as I think we must hold, by the Legislature, when subsequently to those decisions they re-enacted the statute in its former terms in the R. S. O. ch. 118, section 2. See on this point *Crain v. Trustees Collegiate Institute, Ottawa*, 43 U. C. R. 498.

I am therefore of opinion that Mr. Justice Proudfoot's decision was right, and that the decree should be affirmed, with costs.

FERGUSON, J.—I concur, and have nothing to add to what I said in *Brayley v. Ellis*, 1 O. R. 119.

See *Long v. Hancock*, *supra* p. 154.

A. H. F. L.

[CHANCERY DIVISION.]

THE BANK OF BRITISH NORTH AMERICA v. THE
WESTERN ASSURANCE CO.

Marine insurance—Condition precedent—Adjustment—Double insurance—Contribution.

Where, by a certificate of marine insurance, effected in this Province on cattle, representing and taking the place of a policy, it was provided, as the condition of payment, that all claims should be reported to the M. Insurance Company of Liverpool, as soon as the goods were landed or the loss known, to be adjusted according to usages there, and the special condition of the contract of insurance.

Held, that the adjustment by the M. Insurance Company was not a condition precedent to the plaintiffs' right to recover. All that was required to be done by the insured was duly to report to that company the claim to be adjusted.

Defendants, by such certificate, insured for the consignor cattle from Boston to London, England, against all risks, except to be free of particular average, unless the vessel be stranded, sunk, or burned, or in collision. The cattle were consigned to F., and the consignor drew for £1,740 upon F., who accepted the bill and insured the cattle in England for £5,000, 75 per cent., against all risks, and 25 per cent. mortality was not insured against. It was sworn that F. had been told by the consignor to insure in all cases where they had made advances. After the loss F. received £1,500 on account of the English policies, but hearing that an insurance had been effected in Canada, and assuming that it would have the anti-contribution clause, so that the first insurance alone would be liable, they returned the money pursuant to an undertaking which they had given, but the policies were not cancelled.

Held, that there was a double insurance, for the risk the interest and the subject were the same, and the difference between the several policies as to the extent of liability did not vary the risk.

Held, also, that the defendants were liable to the plaintiffs for the whole amount insured, leaving them to recover contribution from the other insurers, according to the rule in force in England and here; but that they were entitled to deduct the £1,500 paid, and that this sum having been repaid under a mistake of fact and without prejudice, the plaintiffs might have recourse to the underwriters for it.

THIS was an action, brought by the Bank of British North America, against the Western Assurance Company, upon a certain certificate of insurance, claiming the amount of loss sustained, costs of suit, and further relief.

The facts of the case appear from the judgment.

The action came on for trial at the sittings of this Division, at Brantford, on September 28th, 1882, before Proudfoot, J., when certain witnessess were examined, and certain evidence, taken on commission read. The trial was then adjourned to Toronto, where it was resumed on April 24th, 1884.

S. H. Blake, Q. C., *Hardy*, Q. C., and *Wilkes*, for the plaintiffs. Double insurance must be by the same parties, on the same interest, but neither of these conditions are fulfilled here. At any rate the plaintiffs are entitled to sue any insurer, leaving him to seek contribution. The evidence shews a complete and independent insurance on October 29th, 1880, and one which the parties here had a right to make. Nothing due subsequently, and in another country, can affect it. Furness had no authority to insure. As to double insurance, and the right of the plaintiffs to recover the whole amount, I refer to *Arnould's Law of Marine Insurance*, 5th ed, vol. 1, p. 328; *Lowndes' Law of Marine Insurance*, p. 53; *Godin v. London Assurance Co.*, 1 Burr. 490.

J. Bethune, Q. C., and *R. M. Wells*, for the defendants. As to adjustment being a condition precedent, see *Phillips on Insurance*, secs. 1814, 1815. In any event £1500 has been paid, and the defendants can only be liable for the balance. The priority of the insurances is of no importance; the policies all covered the same interest. I refer also to *Lishman v. Northern Insurance Co.*, L. R. 8 C. P., 216; *S. C. ib.* 10 C. P. 179; *Phill. on Ins.*, vol. 1 p. 161; *Campbell's Commercial Agency*, p. 410, n. 1; *Ebsworth v. Alliance Insurance Co.*, L. R. 8 C. P. 609.

S. H. Blake, Q. C., in reply. As to the matter of adjustment being a condition precedent, the plaintiffs could not

compel an adjustment, and have done all their part; they should not be prejudiced by what was left undone. I refer to *Klein v. The Union Insurance Co.*, 3 O. R. 234; *Hibbert v. Carter*, 1 T. R. 745; *Arnould*, Law of Marine Insurance, vol. 1, 5th ed., p. 79.

June 25th, 1884. PROUDFOOT, J.—Action upon a certificate of insurance, which is therein stated to represent and take the place of a policy, made by the defendants on October 29th, 1880, insuring for Daniel Osborne 249 cattle valued at \$110 per head, or in all \$27,390, by the steamship *Brantford City*, at and from Boston to London, England. The cattle were insured against all risks, and each animal was separately insured. The condition of payment under the certificate was that all claims should be reported to the Union Marine Insurance Company, of Liverpool, “as soon as the goods are landed or the loss known,” to be adjusted according to usages there and the special conditions of the contract of insurance. The loss, if any, was made payable to the order of the assured indorsed on the certificate.

The certificate was indorsed by Osborne to the plaintiffs for securing the amount of a bill of exchange, drawn for the price of the said cattle, upon Messrs. Furness & Co., of West Hartlepool, England, and discounted in the ordinary course of business by the plaintiffs; 241 of the cattle were lost on the voyage, and the plaintiffs sue for their value, \$26,510.

The defendants admit the insurance, but say that before the making of the insurance the owners of the cattle or their agents insured £5,000 stg. on the same cattle insured by the defendants, in other companies, to wit: The Royal Exchange Company, The Merchants Marine Insurance Company, and the Globe Marine Insurance Company; and that a policy or policies in these companies, or one or more of them, were current at the time of the insurance and were payable to and held for the benefit of the owners of the cattle. The defendants admit the loss. The defen-

dants say that it was a condition precedent to the payment of the loss, that all claims should be reported to the Union Marine Insurance Company of Liverpool, as soon as goods are landed or loss known, to be adjusted according to the usages there and the special condition of the contract of insurance. The defendants also say that the plaintiffs or their agents did notify the Union Marine Insurance Company, who proceeded to adjust the claim, but before it was finally adjusted the company ascertained the existence of the other policies for £5,000, but had not at the time of the commencement of the suit completed the adjustment, owing to a misunderstanding between the plaintiffs and them as to the amount of the insurance under the other policies: that the plaintiffs have been paid £1,500 by the other companies.

The defendants submit that as between the policies of insurance for £5,000, and the policy of insurance of the defendants, there ought to be contribution *pro rata*; and the defendants have always been ready and willing to settle the loss upon that basis, but the plaintiffs are not willing so to settle. The defendants also say that the plaintiffs hold the liability of the persons who are entitled to recover from the other companies a *pro rata* share of the £5,000, in respect of the sums named in the bill of exchange, and the defendants are ready to adjust the loss, but ask to be subrogated to the rights of the plaintiffs' debtors to recover a *pro rata* share from the other companies.

The questions to be determined are, whether there was a double insurance; whether £1,500 was paid to the plaintiffs or Osborne, on account of the loss, by the other insurance companies, or any of them; and whether the adjustment of the claim by the Union Marine Insurance Company was a condition precedent to the plaintiffs' right of action.

The question as to the double insurance is only important as giving a right to subrogation, and as to the payment alleged to have been made on the policies other than that made by the defendants. For the law in Canada is the same as that in England, that in case of a double insurance

the insured may sue any of the insurers, leaving them to recover contribution from the others.

The material facts seem to be as follows :

The bill of lading shows that 249 cattle were shipped at Boston by D. Osborne & Sons, upon the steamship *Brantford City*, on October 29th, 1880, to be delivered at the port of Deptford to Thomas Furness & Co., or to assigns.

On the same 29th day of October, 1880, the insurance was effected with the defendants by Daniel Osborne and payable to his order.

The money for the purchase of the cattle had been advanced by the agent of the plaintiffs in Chicago to D. Osborne, and the railway bill of lading was handed to Mr. Robertson, the agent of the plaintiffs at Brantford, who cashed a draft for £6,123, on October 27th, 1880.

The Marine bill of lading represents the cattle as shipped by Osborne & Son, but the son had no interest in them, David Osborne was the owner.

Furness & Co., were the agents in England of Osborne & Bass, a firm that seems to have been otherwise known as Osborne & Sons.

Mr. Furness had apparently been in Canada before the purchase of the cattle, and became aware of the intended shipment.

On October 14th, 1880, Osborne & Bass drew a bill of exchange on Furness & Co. for £1,740 stg. This was accepted by Furness & Co. on the 28th of October, Furness says this was accepted against the shipment, per *Brantford City*. The bill does not on its face purport to be drawn against any particular shipment. It was paid on the 14th of November, the day it became due. At the time Furness & Co. accepted the bill Osborne & Bass owed them £1,701. 18s. 10d., that was wholly unsecured. Furness & Co. heard by cablegram of the shipment of the cattle from their agents at Boston about the time of the acceptance of the bill. Furness thinks the bill was accepted after hearing from their agents of the shipment. Furness

& Co. directed Henry Willis & Co., insurance brokers in London, on the 26th or 27th of October, to insure the cattle for £3,750, against all risks, £1,250 for total loss. H. Willis & Co. effected these insurances on the 27th of October, though the policies were not in fact issued till the 1st of November, in one case till the 2nd of November. After the loss occurred Furness & Co. received from H. Willis & Co. £1,500 on November 30th, on account. In acknowledging the receipt of it they say: "it is of course understood we hold you harmless in case of failure of underwriters." And Furness & Co. returned that sum pursuant to an undertaking they had given to return it as soon as they heard the cattle had been insured in Canada. The parties in England seem to have been of the opinion that an insurance having been effected in America it would have the usual anti-contribution clause, and that the first insurers would be alone liable. And under this mistake the money was returned.

Now what authority had Furness & Co. to insure? Their business with the Osbornes was only an agency business, and had they been informed of the insurance here they would not have insured in England, but they would have required the policy to be deposited to cover their advances. Mr. Furness says he had no authority from Osborne & Bass to place any insurance on the cattle in question. He says, however, that "one of Osborne's sons on previous occasions was very frequently in Hartlepool and he would give us instructions. We insured if we made any advance unless we knew they had. We had never any instructions in writing, but I recollect very well one of the sons saying we were to insure in all cases where we had made advances unless we had orders to the contrary."

Osborne does not deny this. There is no evidence to the contrary.

In effecting the insurance Furness & Co. very probably intended to get security for the amount then due to them, about £1700, or if the bill accepted by them the following day be taken into account it would be about £3400. The

sum insured, however, was £5000. It would seem, therefore, that it was effected not only for their own security, but for the benefit of the owners also.

I think I must therefore hold that there was a double insurance, and to constitute a double insurance there must be two or more insurances on the same subject, the same risk, and the same interest: *Arnould on Marine Ins.*, 5th ed., vol. 1, p. 328. The defendants' policy insures the cattle from Boston to London, England, against all risks; the only qualification is to be free of particular average, unless the vessel be stranded, sunk, or burned, or in collision. The English policies insure from Boston to Deptford, and one from Boston to West Hartlepool. And they insure 75 per cent. only against all risks, and on 25 per cent. mortality is not insured against. Mr. Spencer (a) says, the West Hartlepool policy should have been Deptford.

As no question was made on this point, I assume that Deptford is within the port of London. In that case the risk was the same, the subject the same, and the interest the same. For Willis & Co. were the agents of Furness & Co., and Furness & Co. were the agents of the Osbornes, and I think the insurance was effected for the benefit of the former. I do not think that the variations in the several policies as to the extent of liability vary the risk.

Although the £1500 was returned to the underwriters, the policies were not cancelled. On the 9th of December, 1880, Furness & Co. write to Willis & Co.: "You will not of course cancel our policies until you know what steps the American underwriters adopt. On the same day Willis & Co. write to Furness & Co.: "We intend appealing to the underwriters to meet you in regard to the freight and charges, for which purpose, and also until it is seen whether the Canadian policy pays in full, our insurance must still be kept open."

On the 10th of December Furness & Co. write to Willis Co.: "We cabled out to Canada yesterday, informing the

(a.) Mr. Spencer was a clerk in the office of Messrs. Willis & Co.

shippers that as the Canadian policy was of prior date, our English policy will have to be cancelled. If the Canadian office agrees to this, then our policy will be cancelled; but if they do not agree to this, then it will become, in our opinion, a case for average between the two companies." And again, on the 3rd of May, 1881: "Our Brantford agents advise us that the shipper of the stock and the Western Insurance Company are in litigation, and the case is expected to be decided very shortly, when we think the present position of the English companies should not be altered until the decision is given. Our own impression is, that the two insurances will have to be put together and made a general average of."

The reason for the English underwriters claiming exemption appears in a letter from the secretary of the Royal Exchange Assurance to Willis & Co. of the 8th of December, 1880, in which he says: "I have reason to suppose that the other (Canadian) insurance was effected prior to the one of which this corporation policy forms part, and that in all probability with conditions claiming priority, and barring double insurance; facts I am making inquiry of."

And in his examination of the 15th of March, 1883, Mr. Christopher Furness says: "The original policies (English) are in my possession. I produce them. I am not willing to hand them to the commissioner because they belong to Messrs. Thomas Furness & Co., my late firm, who have still a claim upon them, and the premium has been paid by them. We have not recovered upon them pending the dispute in this action."

It seems clear therefore that the English policies still subsist.

I apprehend, therefore, that the defendants are liable in this action to the plaintiffs for the whole amount of the insurance, leaving the defendants to recover contribution from the other insurers, according to the rule in force in England and Canada.

Had the English policies been cancelled by the plaintiffs,

or those by whose action they are bound, without communication with the defendants, and without their assent, I would have held the defendants liable only for their rateable proportion of the loss. But the policies exist and they have their remedy upon them.

It remains to consider the effect of the payment and repayment of the £1,500 by and to the English underwriters. This sum was received from these underwriters, and upon the discovery of the insurance in Canada repaid to them upon the supposition stated above in the letter from the Secretary of the Royal Exchange Company, that the policy was subject to the usual American condition claiming priority and barring double insurance.

The payment by the underwriters was properly made. They were liable for their proportionate share of the loss. The defendants would therefore seem entitled to say that in this action they should only be liable for the balance after deducting the £1,500. The re-payment of this sum was made by mistake, but it was made without the assent of the defendants by persons for whose acts the plaintiffs are responsible, and the defendants ought not to be prejudiced by it. As it seems to have been repaid under a mistake of fact, the form of the policy, and in one instance without prejudice, the plaintiffs will have recourse to the underwriters for it.

I do not think the adjustment by the Union Marine Insurance Company was a condition precedent to the plaintiffs' right to recover. All that was required to be done by the insured was to report to that company to be adjusted. This the insured did, and on the 1st of December, 1880, the secretary certified that a loss of 241 cattle insured for £5,355. 11s. 1d., with the defendants had been proved to the satisfaction of the Company, but the bill of lading not having been indorsed by the consignees that document was not complete. The bill of lading had been apparently then indorsed though not presented to the Company. But the certificate above given was withdrawn by the Company on the 4th of December, because the interest

had been insured in England by the consignees. The reason is not a sufficient one for withdrawing the certificate, as a double insurance was not stipulated against by the defendants. But the Company were the nominees or agents of the defendants. The plaintiffs did all that was required of them—reported and proved the loss. The Company ought to have certified the loss, leaving the insurance companies to arrange between themselves as to the settlement of the sum insured. When the defendants or their agent prevent the fulfilment of a condition, even if precedent, they cannot rely on nonfulfilment as a defence. Everything, however, required to be done by the insured was done.

I have not thought it material to ascertain whether the Canadian or the English insurances were prior in time, and do not need to consider the effect of a slip or covering note. For I think that all the insurers are liable notwithstanding a difference in the date of effecting the insurances. I notice that upon his examination Mr. Kenny, the manager of the defendants' company, thinks the defendants are liable for the sum insured by them, less the £1,500 paid as above mentioned.

I have treated this matter throughout as if the plaintiffs and the Osbornes were to be treated in the same manner. There is no case made in the bill to place them on a different footing. No doubt the plaintiffs advanced the money for the purchase of the cattle, and expected to be repaid out of the proceeds when sold. Mr. Robertson, their agent at Brantford, who made the advance, says they had nothing beyond that but the word of the Osbornes and the understanding he had with them on which the advance was made. They did not take the bill of lading in their own name. There is nothing to connect the defendants with any arrangement or agreement of that kind. The certificate of insurance given by them was delivered to Mr. Hately, the agent of Furness & Co., at Brantford, and it remained with him till after the loss had happened, when it was handed to the plaintiffs to enable them to prove their loss.

The contention of the defendants is, that they are only liable to the plaintiffs to a proportionate share of the loss. In this I think them mistaken, and that their manager takes a juster view of their position. And although the plaintiffs have failed in their contention that there was no double insurance, and in regard to the apportionment of the £1500, I think them entitled to their costs.

A. H. F. L.

[CHANCERY DIVISION.]

WILSON v. WILSON.

Will—Election—Dower.

A testator, after bequeathing certain legacies, devised his lands to his sons, charging them, however, with the legacies and also with an annuity of \$100 to his widow, to whom he also bequeathed his furniture, apartments in his dwelling house, and sundry other things. The estate was sufficient to answer all legacies, and also the widow's dower. *Held*, that the widow was not put to her election as between the will and her dower.

THIS was an action brought by Jane Wilson, widow of one William Wilson, deceased, against George Wilson and John Wilson, devisees of certain lands under the will of the said William Wilson, claiming dower in the said lands, and also damages for the detention of dower, and further relief.

The said William Wilson died on October 17th, 1874, seised of the lands in question, and his will was dated May 5th, 1873,

In her statement of claim the plaintiff, besides setting up her claim to dower and damages for the detention thereof, also set up her claim to ten cords of stove wood as provided by the said will to be a charge upon the said lands, and charged that the defendants had neglected and refused to furnish it, whereby she had sustained and wherefor she claimed \$140 damages.

In their joint statement of defence the defendants set out the will in question, as follows:

This is the last will and testament of me William Wilson of, &c., farmer.

I direct the payment of all my just debts, funeral and testamentary expenses. I give and bequeath to my sons Joseph Wilson, Charles Wilson, and William Wilson, the sum of \$2 each, absolutely; I give and bequeath to my daughter Jane, wife of William Wilson, the sum of \$2, absolutely; I give and bequeath to my son Thomas Wilson the sum of \$1,500, to be paid to him in three equal annual payments of \$500 each, the first payment thereof to be

made at the end of one year after my decease, to be paid to him by my two sons, George Wilson and John Wilson, and chargeable upon and payable out of the lands hereinafter devised to them.

I give and devise to my beloved wife Jane Wilson one clear annuity of \$100 payable half yearly on the first days of the months of April and October in each year during her natural life, chargeable upon and payable out of the said lands herein by me devised to my said sons George and John, together with all my household furniture, bed, bedding, and clothing which shall be in or about my dwelling house at the time of my decease, and her choice of any of the cows she may select, the same to be kept for her, summer and winter, by my said sons George and John on the premises, and to be well fed and pastured; and also my said wife is to have the sitting room and the bed room off the same of my present dwelling house so long as she shall live, with free ingress and egress to the same, and also my said wife to be furnished by my said sons George and John with a horse and buggy on all such occasions as she shall require the same to go to church or see her friends; and to be by them, my said sons George and John, supplied with ten cords of stove wood split and properly prepared for use to be delivered to her in the yard in a convenient place.

I give, devise, and bequeath to my said sons George Wilson and John Wilson all and singular [the lands in question] to hold to them their heirs and assigns forever, subject only to the legacies hereinbefore by me bequeathed, with the payment of all which I hereby specially charge and make chargeable the said lands and premises, also my said sons to have all my farm stock and implements, hay, grain, and growing crops of every nature and kind whatsoever which I may own at my decease, in equal shares, (excepting therefrom the cow which my said wife may select.) I revoke all former wills. I appoint my said son Charles Wilson, and my trusty neighbour William Forgarty, to be the executors of this my will.

In witness whereof, &c., &c.

And the defendants said in their said statement of defence, that in and by the said will there were bequeathed to the plaintiff certain benefits charged against and payable out of the said lands, which benefits the plaintiff had ever since the death of the said testator enjoyed and received and accepted, and they submitted that the plaintiff had elected to accept the said benefits so devised to her as aforesaid in lieu of her dower out of the said lands: that they had paid to the plaintiff all the money, and supplied her with all the wood and all the other benefits so by the said will as aforesaid bequeathed to her; and they denied all allegations in her statement of claim giving any colour of right to the plaintiff to bring this action: and they submitted that the action should be dismissed with costs.

The plaintiff joined issue on the statement of defence.

The action was tried at Orangeville, on October 10th, 1883, before Osler, J. A.

J. Reeve, for the plaintiff.

J. Fleming, for the defendant. The will raises a case for election, and as a matter of fact the widow has elected to take under it: *Parker v. Sowerby*, 4 DeG. M. & G. 321; *Hutchinson v. Sargent*, 16 Gr. 78; *McLennan v. Grant*, 15 Gr. 65; *Becker v. Hammond*, 12 Gr. 485. The property has been disposed of in a manner inconsistent with the wife's right to dower.

Reeve, in reply. The will does not contemplate a personal occupancy of the farm by the sons. A gift of an annuity to the widow is not inconsistent with the right to dower. The intention of the testator must appear in the will: *Murphy v. Murphy*, 25 Gr. 81.

November 17th, 1883. OSLER, J. A.—My conclusion is, that the plaintiff is not put to her election between her dower and the provision made by the will.

Her husband died seized of the land out of which

the dower is claimed, and devised it to the defendants charged with a legacy of \$1,500, to one Thomas Wilson, payable in three yearly instalments, and also with an annuity of \$100 to the plaintiff, his widow, payable half-yearly, during her natural life. He also gave her all his household furniture which should be in the house at the time of his death, and her choice of any of the cows, the same to be kept for her summer and winter by the defendants on the premises, and to be well fed and pastured. He also gave her the sitting-room and bedroom in the dwelling house so long as she lived, and directed that she should be furnished by the defendants with a horse and buggy on all such occasions as she should require the same to go to church or see her friends; and she was to be by them supplied with ten cords of stove wood split and properly prepared for use, to be delivered to her at a convenient place.

Upon the evidence I think the value of the farm may be placed at between \$5,500 and \$6,000 at the time of the testator's death.

The stock and farm implements, hay, grain, and crops of all kind were bequeathed to the defendants. Their value was said to be about \$2,000.

It is not possible to reconcile all the cases on the subject, or I should perhaps say the views which different Judges have taken of the effect of the provisions of the will in each particular case as indicating the testator's intention that the widow should be put to her election. The rule of decision is thus stated by Vice-Chancellor Kindersley, in *Gibson v. Gibson*, 1 Drew. 42: "It must be clear and beyond reasonable doubt that there is a positive intention to exclude her from dower either expressed or clearly implied" before the widow can be put to her election.

Here the plaintiff is not put to her election by the terms of the will, and I am unable to see that there is anything in the provisions of the will inconsistent with her claim to dower. The annuity and the legacy, though charged on the land, do not exclude it: *Holdich v. Holdich*, 2 Y.

& C. 18 ; nor does the life interest given to her in part of the house, as was decided in the old case of *Lawrence v. Lawrence*, 2 Vern. 365, and notes, 3rd ed. ; and I think there is nothing in the other provisions made for the widow which necessarily indicates that the testator's intention was that the devisees should have the personal use and enjoyment of the whole of the property, other than the two rooms in the house: *Butcher v. Kemp*, 5 Madd. 61 ; *Miall v. Brain*, 4 Madd. 119.

I refer to *Murphy v. Murphy*, 25 Gr. 81 ; *Ripley v. Ripleg*, 28 Gr. 611 ; *Beilstein v. Beilstein*, 27 Gr. 41 ; *McLellan v. McLellan*, 29 Gr. 1 ; *Rody v. Rody*, *Ib.* 324 ; *Gillam v. Gillam*, *Ib.* 376.

In *Becker v. Hammond*, 12 Gr. 485, the provision for the wife was of a much more ample character, and was such as to exclude the probability that she would need any other means for her support. Moreover, the extrinsic evidence went to shew the estate devised was insufficient to satisfy the widow's claim for dower and the provision made for her by the will.

In the case before me, I am of opinion that the estate is sufficient to answer the legacies and annuity, and also the widow's dower, so that there is nothing in the extrinsic circumstances to put the widow to her election.

If it should hereafter be held that a case for election by the widow had arisen, I find as a fact that she had not elected.

The plaintiff is entitled to judgment for her dower, with costs. I make no order as to damages for detention of dower, or arrears of dower.

A. H. F. L.

[CHANCERY DIVISION].

OMNIUM SECURITIES COMPANY V. RICHARDSON.

Specific performance—Absence of common intention—"Without prejudice."

R. wrote to O. "I have considered the matter of our conversation, and offer you \$800 for the property." O. replied: "I have your favour offering \$800 for the property (describing it). I have concluded to accept your offer." The evidence shewed that at the prior conversation referred to in R.'s letter, R. was seeking to buy the property in question on terms of five or seven years' credit.

Held, that as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it.

A letter containing an offer written "without prejudice," means "I make you an offer; if you do not accept it, this letter is not to be used against me." But when the offer is accepted, the privilege is removed.

THIS was an action for the specific performance of a certain alleged contract for the sale of lands in the Town of Walkerton, by the plaintiffs, as mortgagees, under a power of sale in their mortgage, to the defendant. The contract was alleged by the plaintiffs in their statement of claim to be contained in certain letters dated respectively, June 28th, 1883, and July 2nd, 1883, which, with the other facts of the case, are set out in the judgment, and under its terms, the plaintiffs alleged, the sum of \$800 was to be paid by the defendant forthwith as the price thereof.

By his statement of defence, the defendant disputed that any agreement was ever made by him with the plaintiffs to purchase the land.

The action was tried at Toronto, on December 1st, 1883, before Boyd, C.

J. W. Nesbitt, for the plaintiffs.

D. W. Ross, for the defendant.

After the plaintiffs had closed their case,—

Ross, for the defendant, moved for judgment. The offer was "without prejudice," and cannot be used in evidence.

W. Nesbitt, contra. As to the letters being "without prejudice," referred to *Vardon v. Vardon*, 19 C.L.J. 229 (a),

(a) Since reported at length 6 O. R. 719.

and several cases to shew the contract was sufficiently evidenced to satisfy the Statute of Frauds.

The defendant's evidence was then taken.

W. Nesbitt, asked judgment for specific performance.

Ross, for the defendant.

January 14th, 1884. *Boyd, C.*—A letter, containing an offer, written, "without prejudice," means "I make you an offer; if you do not accept it, this letter is not to be used against me." Such was the joint opinions of Lords Justices James and Mellish in *Re River Steamer Co., Mitchell's Claim*, L. R. 6 Ch., pp. 827 and 832. But in this case the offer was accepted by the company, so that the privilege is removed.

However, the effect of the correspondence is to be considered, and, upon that, taken with the evidence, I am of opinion that the parties were not at one as to the terms of the contract. The offer in the letter of 28th June is in these terms:

COURT HOUSE, WALKERTON, June 28th, 1883.

Mr. Wood:

SIR—I have considered the matter of our conversation when you were with me, and have come to the conclusion to offer you eight hundred dollars for the property, and then I doubt if I am doing justice to myself, because I have no use for it; and as long as I do not get a customer, the interest and taxes would soon eat up any apparent profit I may see in it. And it is my desire, if (not?) otherwise disposed of, that it be publicly advertised, and then whatever it sells for I shall not complain.

I make this offer without prejudice.

I am yours, &c.,

W. RICHARDSON.

And the answer is as follows:

OMNIUM SECURITIES COMPANY, HAMILTON, July 2nd, 1883.

W. Richardson, Esq., Court House, Walkerton:

DEAR SIR—I have your favour of the 28th ult., offering eight hundred dollars for the property, formerly owned by your son, situate in the Town of Walkerton, and being composed of part Lot No. 3, in Hall's subdivision of said Town of Walkerton, containing two and a half acres, more or less, and upon which is erected a building used as a shingle factory. Although the price is much less than the amount due us on foot of our

mortgage, but with the hope that you may soon be able to restore your son (now absent) in his former position, I have concluded to accept your offer (viz., \$800). Please, give us the name of your solicitors, and we shall prepare the deed at once, and forward it to them.

Yours, truly,

JOHN F. WOOD.

Afterwards, on August 13th, 1883, the defendant wrote the following post-card, referring to the property in question :

J. F. Wood, Esq.:

HAMILTON,

SIR—I find that I cannot handle the shingle mill and property attached.

WM. RICHARDSON.

The offer refers to, and is based upon, a previous conversation, at which it is sworn by the defendant, and, in effect, admitted by the plaintiffs' agent, that the defendant was seeking to buy on a five or seven years' credit. He sought still to buy in that way when he wrote this letter. It contains a reference to "interest and taxes" in the body of it. That confirms the oath of the defendant as to his meaning, and this expression is not properly explicable except upon the theory of the defence: *McDonell v. McDonell*, 21 Gr. 342. The cases there referred to shew that a contract will not be specifically enforced if the parties differ in their understanding of it. The acceptance by this company was as of a cash offer, but this the defendant did not contemplate, and did not intend to make.

The facts in this case are more favourable for the defendant than those in *McDonell v. McDonell*. It was there sought to get rid of the apparent meaning of the written agreement. Here the writings indicate the basis on which the offer was made, and are better explained by giving effect to the defendants' version of the transaction than in any other way.

I have not gone minutely through the other objections which are raised against the right of the plaintiffs to maintain this action. But I incline to think they are not

tenable. In regard to the sufficiency of the contract under the statute, the case is distinguishable from *McClung v. McCracken*, 2 O R. 609. The letter of Mr. Wood shews on its face that he is manager of the plaintiffs. He refers to the price offered as less than what is due "as on the foot of our mortgage." Upon this evidence was admissible to connect the mortgage with the correspondence, and from that it appears that the plaintiffs were mortgagees, with power of sale.

But upon the other grounds the result is, the action should be dismissed, and, I think, with costs.

A. H. F. L.

The plaintiff appealed, and on December 10th, 1884, this case was argued before the Court of Appeal, and the appeal dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. WALKER.

Conviction under 32-33 Vict. ch. 28—Fine and costs.

A conviction under 32-33 Vict. ch. 28, for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment.

Held, good.

THIS was a motion to quash a conviction under ch. 28 of 32-33 Vict., entitled "An Act respecting Vagrants."

The defendant was charged with being a vagrant, he being a keeper of a house of ill-fame.

The grounds of motion were :

1. That the justices had no power to award costs.
2. Nor had they power to inflict a fine and imprisonment in default of payment.

Holman, for the motion.

Hilton, contra.

December 9, 1884. ROSE, J.—The Act in question provides that Justices of the Peace may fine or imprison, or fine and imprison.

I do not see that the conviction is open in fact to the second objection taken. It orders payment of fine and costs, directs collection by distress, and in default of distress orders imprisonment.

The Act makes no provision for imposing costs or collecting either fine or costs. As the provisions of ch. 31 of 32-33 Vict. are applicable, costs may be awarded under sec. 53 of that Act and the fine or penalty and costs may be levied under sec. 57 and following sections.

Under secs. 41 and 51 of the same Act forms of convictions are provided. The statutory form has been carefully followed and I am unable to see that in any way the magistrates have committed any error. Had they made out a warrant of commitment ordering distress and in default imprisonment, this would have been an error, as the warrant of commitment should not be issued until

after distress had failed under the provisions of sec 62, or where no distress was levied until the provisions of sec. 59 had been complied with.

I think the motion must have been instructed under an impression that the conviction should not have ordered payment of fine and costs, distress and commitment, all in the same order. Reference to the forms will shew this not to be an error. The commitment must of course issue before the apprehension of the offender, and that not until the prior steps provided by the statute have been observed. *Regina v. Bell*, 13 U. C. L. J. N. S. 200, was cited as an authority for the motion. The report is very brief but it is clearly not an authority in support of either objection.

There the magistrate imposed a fine, and directed imprisonment in default of payment. It is enough to say that is not this case. The case upon which that decision was founded was *In re Slater and Wells*, 9 C. L. J. 21, reference to which will shew it to be founded on quite different statutory provisions.

The motion must be refused, with costs.

Since writing the above I have been referred by Mr. Holman to *Regina v. Clarke*, where Mr. Justice Armour held that costs could not be adjudged under sec. 17 of ch. 32 of 32-33 Vic.

Reference to that section will shew that while it is provided that the party charged may on conviction be condemned "to pay a fine, not exceeding with the costs in the case, \$100, or to both fine and imprisonment not exceeding for said period and said sum," the section makes provision only for collection of the fine, and says nothing further about the costs. The conviction in that case provided for payment of fine and costs, and in default of distress imprisonment. The conviction was therefore clearly bad.

It was not necessary in that case to determine the meaning of the words "fine not exceeding with costs in the case \$100," nor does such necessity arise here. The difficulty is one to be grappled with when it arises.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

PRITCHARD V. STANDARD LIFE ASSURANCE COMPANY.

Private international law—Administrator—Right to sue for moneys payable in foreign state.

To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by the terms thereof, was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there: that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys.

Held, on demurrer, a good defence.

THIS was a demurrer to paragraph 4 of the statement of defence.

The action was on a policy of assurance by the administrator of one William Monteith.

The statement of claim shewed the policy to be payable to his executors or administrators, and that after due proof of death, &c., payment of the moneys was demanded and refused.

The defence demurred to was that the policy was issued from the defendants' office in Montreal, in the Province of Quebec: that by the terms of the policy the moneys were made payable at such office: that defendants had no office in Ontario for payment of moneys by them, and that the plaintiff had not obtained administration to the will in Quebec, and had no right or title to sue for the moneys.

To this the plaintiff demurred on the ground that it was not necessary to take out administration in Quebec to entitle him to maintain this action.

MacGregor, for the plaintiff.

Rae, contra.

Both parties relied upon *Irwin v. Bank of Montreal*, 38 U. C. R. 375, and the defendants also referred to *Westlake on International Law*, secs. 57, 86, 87, 90, 91, and 100; *In re Commercial Bank Corporation of India and the East*,

L. R. 5 Ch. App. 314; *White v. Hunter*, 1 U. C. R. 452; *Foote's Private International Jurisprudence*, 207 *et seq.*; *Wells's Res Adjudicata*, sec. 525; *Story's Conflict of Laws*, 8th ed. 730, 733, and notes.

December, 22, 1884. ROSE, J.—It may be taken for granted that the policy is in the possession of the plaintiff, having come to him from the possession of the insured at the time of his death, and that the testator, at the time of his death, was domiciled in the Province of Ontario; also that the defendants have either their head office in this Province, or are chartered here, or have assets here liable to the payment of this claim. If so, the plaintiff may maintain an action on such policy against the defendants in this Province, and recover the moneys as assets to be administered here, if the fact that the money is by express terms of the contract made payable in Montreal, and that the defendants have no office for payment of the moneys in Ontario does not constitute a defence.

It is rather difficult to deduce all the above suggested statement of facts from the pleadings, and if the opinion I am about to express be not the correct one, it may be the plaintiff, in order to shew a right to recover as against the facts stated in the plea, may require to amend either his statement of claim, or reply to the statement of defence.

The position the defendants take is this—we have an office in Montreal for the payment of these moneys; we have no office in Ontario for paying them; we have by express stipulation in the contract provided for payment at Montreal; we, therefore, are not bound to pay you in Ontario, because of the terms of the contract; nor are we bound to pay you in Quebec, because administration in this Province does not clothe you with authority to demand payment in Quebec.

As the foreign law is a fact to be proven, and as, in the absence of proof, it must be taken to be the same as the law in this Province, I must assume that the grant of administration here would not clothe the plaintiff with

any authority when he goes out of this Province, for a foreign administrator could not sue or collect assets in this Province on the strength of his foreign letters.

It is true that money payable without place named is payable to the creditor, and it is the debtor's duty to seek out the creditor, and pay him without any request. "The law casts upon the debtor the duty of seeking out his creditor, whilst he remains within the realm of England and paying the money without any request:" *Ball's Principal of Torts and Contracts*, 366. But as to debts payable at a particular place, see *Story on Conflict of Laws* 8th ed., p. 733, note 1, and *Story on Contracts*, 5th ed., sec. 1329, where it is said, citing the rule laid down by Baron Parke, in *Startup v. Macdonald*, 6 M. & G. 593, "A party who is by contract to pay money, or to do a thing *transitory* to another, *anywhere*, * * must find the other at his peril * * if the other be within the four seas. * * But where the thing is to be performed at a *certain place* * * to another party to a contract, then there tender must be *at that place*, and * * there the law, though it requires the other to be present," &c.

In *Irwin v. Bank of Montreal*, 38 U. C. R. at p. 392, it was held that when the deposit of the money was made at the branch of the bank at Cobourg, it was payable at Cobourg, and not at Montreal, unless possibly after a demand, "according to the terms of the deposit receipt, * * and a sufficient time allowed to the head office (Montreal) to make the necessary enquiry at the branch office to ascertain if the money could be safely paid, and upon paying the proper charges occasioned by such communication, and probably also the discount."

In this case there is only one office where money is payable, and if such had been the case in *Irwin v. Bank of Montreal*, the fair result would have been that the money would not have been payable elsewhere than at such office.

On page 395 we find the statement referring to the payment at Montreal to an Irish administrator who had duly recorded such letters in the Superior Court in Mon-

trear: "It was rightly paid there, though the administrator could not, as I have said, have compelled it to be made there."

If the plaintiff could compel payment by the defendants here, where they have no office for payment, they could equally be compelled to pay in China or Japan if the deceased had died there and letters of administration had been there granted, although by the terms of the contract the money was payable in Montreal, and there was no one there to demand it who had the right to receive it there, and therefore no one to whom a wrongful refusal to pay it there could have been made, even if such refusal would as between the original parties to a contract to pay during the life time of the payee have entitled the payee to maintain the action elsewhere than where made payable.

I am, therefore, of the opinion that this action is not well founded, and the demurrer must be overruled, with costs to the defendants in any event of the cause.

If the plaintiff can amend so as to set up a state of facts shewing him entitled to succeed, notwithstanding such defence, he may do so on the usual terms.

In addition to the authorities above cited reference may be had to *Story* on Contracts, 5th ed., vol. 2, sec. 1329; *Ball's Principles of Torts and Contracts* (1880), 366; *Bliss on Life Assurance*, 2nd ed., sec. 354.

Judgment for defendants on demurrer.

[QUEEN'S BENCH DIVISION.]

WALDIE V. BURLINGTON.

Order amending plan by closing street, R. S. O. c. 111, s. 84—By-law declaring street open—Municipal Institutions Act, R. S. O. c. 174, s. 506—Quashing by-law.

By an order of the County Judge, upon the application of the plaintiff, after hearing numerous parties, including the defendants, a certain street on a registered plan was closed up. Thereafter the defendant municipality passed a by-law declaring the street in question open. On a motion to quash the by-law.

Held, that the by-law should be quashed, as having been passed in disregard and contempt of the order.

Held, also, that as the order showed jurisdiction on its face, the evidence upon which it had been made should not be looked at on this application.

THIS was a motion, by Laidlaw, to quash By-law No. 60 of the Village of Burlington, purporting to be passed under the provisions of the Municipal Institutions Act, R. S. O. ch. 174, sec. 506, under which the municipality claims the right to open up any allowance for road which is wrongfully closed, or which after dedication to the public remains unopened.

The motion to quash was based on the ground that the applicant prior to the passing of the by-law in question obtained an order to amend or alter the plan of the property through which the roads in question ran, thus closing up the roads. The order was obtained from the Judge of the County Court in which the lands lie, under the provisions of sec. 84, ch. 111, R. S. O.

Carscallen, for the municipality, objected that the learned Judge had no jurisdiction to make the order:

1. Because the applicant was not an "assign" of the person filing the plan.

2. Because "all parties concerned" were not notified and brought before the learned Judge before making the order.

Laidlaw, contra.

December 22, 1884. ROSE, J.—The order in question is put in and recites the hearing of many parties, amongst others of this municipality, also the viewing of the

premises by the learned Judge, and on its face shews jurisdiction.

On the argument I expressed a strong opinion that the course of the municipality was a highly improper one, and further consideration has not caused me in any degree to vary the opinion then formed.

The 84th section of the Registry Act, R. S. O. ch. 111, provides that "in all cases amendments or alterations of any such plan or survey may be ordered to be made at the instance of the person filing or registering the same, or his assigns, by the Court of Queen's Bench or Common Pleas, or by the Court of Chancery, or by any Judge of any of the said Courts, or by the Judge of the County Court of the county in which the lands lie, if on application for the purpose duly made, and upon hearing all parties concerned, it be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient."

Under this provision the municipal council and others were summoned, the council attended and opposed the application, and the learned Judge, in the exercise of the judicial discretion vested in him by the statute made the order. The council thereupon, in defiance of the order, and for the purpose of preventing its operation, passed this by-law, declaring open the very streets that the order permitting the alteration of the plan had by such alteration declared closed.

It seems to me that the effect of the Judge's order was to close up the streets, and the proprietor of the land covered by the plan became proprietor of the land formerly occupied by or laid out as streets. If it had appeared just to impose conditions the section provided for imposing such as might be deemed expedient.

If the municipal council deemed it to be in the interest of the public that roads or streets should be opened through this property, applicant's counsel admitted their power to expropriate land for such purpose, paying for same as provided in the Municipal Act; and it may be such power exists.

I am clear, however, that the Legislature never intended to sanction such a course as was here followed. The Judge of the County Court is by the section given the same jurisdiction within his county as the Court of Queen's Bench or Common Pleas, or the Court of Chancery. If an order had been made by one of the Superior Courts to close up the streets in question possibly it would not have occurred to any one to advise that it be disregarded, and the order of the Judge of the County Court in the premises has quite as much solemnity and effect.

Mr. Carscallen admitted that the learned Judge had jurisdiction to entertain the application, but not to make the order, as it was not warranted by the evidence, and contended that he was entitled to have the evidence before the learned Judge reviewed by this Court, and to have an enquiry into the sufficiency thereof to warrant the order. I am not of such opinion. While the order stands it must be respected. If there is any mode of appeal or review given it has not been adopted. If none has been given then the learned Judge's order is final and not reviewable. No mode of taking the evidence is pointed out by the statute, nor is any record of the proceedings required. I cannot tell what passed before the learned Judge. His notes, which are said to be among the papers, but which I decline to examine, may or may not disclose the whole of the evidence. It is not probable that all the knowledge acquired by the view of the premises has been recorded in his notes. Certainly, at the instance of the municipality, who were summoned and who were present, I should not entertain the objection that some one else who does not complain was not notified; nor shall I examine the evidence to see whether in my opinion the applicant was an "assign" of the original proprietor filing the plan.

It is sufficient for me to find the order and that the by-law was passed in disregard and contempt of its provisions. I make absolute the order *nisi* to quash the by-law, with costs.

It seems to me a fair measure of justice would be

accorded those members of the council who acted in passing the by-law if they were made to pay the costs personally. As to this, however, I say nothing further.

Order nisi absolute.

[CHANCERY DIVISION.]

CAREY V. THE CITY OF TORONTO.

Vendor and purchaser—Sale according to a plan—Leaseholds—Rights of purchaser—Notice—Parties.

The City of Toronto laid out a block of land in three rows of lots, one row fronting to the south on B. street ; another row fronting to the west on H. street ; and another row fronting to the north on C. street, with a lane twenty feet wide, running round the block in the rear of the lots, and on May 18th, 1881, sold certain of these lots by public auction.

A plan of the land was exhibited at the sale, and copies given to the bidders, and the sale was made according to this plan, which was incorporated in the contracts of purchase. C. bought lot 10 fronting to the south ; and M. bought all the lots fronting to the west, signing a similar contract in respect to them. A lease of his lots was, on June 14th, 1881, granted to M. by the city, not according to the plan incorporated in the contract of purchase, but according to a plan, registered as No. 352, subsequently prepared, in which the lane in rear of M.'s lots was not shewn. On May 19th, 1882, C. accepted a lease of his lot No. 10, expressed to be a lease of "lot 10 according to registered plans numbers 352 and 380," which latter was similar to that incorporated in the contract of purchase at the sale. Subsequently M., with full notice of C.'s purchase, and that he claimed the right to have the lane behind M.'s lots kept open, closed it up, and C. now brought this action to compel him to re-open it.

Held, that C.'s rights under his lease were the same as if he had been given, immediately after his purchase, a lease according to a plan identical with that by which he made his purchase ; that M. could have acquired no rights against him by reason of anything done since the purchase, and plan 380 must be considered as incorporated in C.'s lease.

Held, therefore, that C. was entitled to the benefit of the lanes all round the block, and had a right to maintain this action and compel M. to remove the fences placed by him in obstruction of the lane behind the lots purchased by him, M., and that without making the other purchasers at the sale parties."

THIS was an action brought by one Patrick Carey against the Corporation of the City of Toronto and Alexander Macdonell, in which the plaintiff claimed that the defend-

ants should be ordered to open up and maintain a lane in rear of certain lots in the city of Toronto, one of which had been purchased by him, as shewn in the plan by which the said lots were sold, and as shewn in another plan registered in the registry office of the city of Toronto, as plan 380; that they should also be ordered to pay him certain law costs incurred by him through applications to the council and property committee of the said corporation with reference to the matter, and the costs of this suit, and to repay to him the rental and taxes paid by him upon the said lot so purchased by him.

The facts of the case fully appear in the judgment.

The case first came up for hearing at Toronto, on November 7th, 1882, before Proudfoot, J., when it appearing that the plaintiff had mortgaged his lot to certain persons not parties to the suit, it was adjourned till the next sitting of the Court that these might be made parties.

The case was finally heard at Toronto on June 1st and 2nd, 1883, before Ferguson, J.

At the close of the evidence the learned Judge called upon counsel for the defence to begin.

C. Moss, Q. C., for the defendant Macdonnell. All the leases of the property in question, except the plaintiff's, are drawn under plan 352, and the lessees do not desire to have the lane in dispute opened. The plaintiff's lease is under plan 352, and 380. I submit the action cannot proceed in the absence of the other lessees. Moreover, neither the contract, the plans, nor the lease give the plaintiff the right to the lane in question, nor was any representation made concerning it. The contract merely gave a right to the lane upon which the plaintiff's lots abuts, and the plan is for nothing more than for the purpose of identifying the lot sold. I refer to *Heriot's Hospital v. Gibson*, 2 Dow 301; *Squire v. Campbell*, 1 Ml. & Cr. 450; *Nurse v. Lord Seymour*, 13 Beav. 254; *Randall v. Hall*, 4 DeG. & S. 343; *Regina v. Rubridge*, 25 U. C. R. 299; R. S. O. ch. 146, sec. 72. The making of plan 380 has no effect

upon the rights of the parties at all. The defendant Macdonnell purchased before it was made. The alteration made was within the above statute. Or if the plaintiff's view of his contract were tenable, the alteration should be allowed under R. S. O. ch. 111, sec. 84. I refer to *Breynton v. London and Northwestern R. W. Co.*, 2 Coop. Temp. Cott. 108; *Beardmer v. London & Northwestern R. W. Co.*, 1 H. & T. 161; *Rossin v. Walker*, 6 Gr. 619; *Clancy v. Cameron*, 6 Gr. 623; *Regina v. Boulton*, 15 U. C. R. 272; *Re Morton and the Corporation of the City of St. Thomas*, 6 A. R. 323.

McWilliams, for the City of Toronto.

W. M. Clarke, for the mortgagees.

S. H. Blake, Q. C., for the plaintiff. The English cases do not apply. The plans in those cases were made not for the purposes of the sales, but for the House of Commons in relation to woods and forests. Here the plan was for the purpose of the sale, and the conditions of sale mention it. *Regina v. Rubridge*, *supra*, is a different case, for there no lot was sold at all. In *Squire v. Campbell*, *supra*, the plan was not mentioned in the leases. In *Nurse v. Lord Seymour*, *supra*, the plans were old ones and prepared for quite another purpose. The sale according to the plan is binding, and amounts to a dedication of all the ways on the plan. I refer to *Roberts v. Karr*, 1 Taunt. 495; *O'Brien v. Village of Trenton*, 6 C. P. 350; *Nene Valley Drainage Commissioners v. Dunkley*, 4 Ch. D, 1; *Espley v. Wilkes*, L. R. 7 Ex. 298; *Gillatley v. White*, 18 Gr. 1. As to joining the other purchasers, that would amount to multifariousness. See *Cline v. Cornwall*, 21 Gr. 129; *Waterman* on Spec. Perf., sec. 50, p. 73.

C. Moss, Q. C. The costs of the city of Toronto should be paid by the plaintiff even if he succeeds. There is nothing said in the lease about the purchase being according to a plan. I refer to *Fewster v. Turner*, 11 L. J. Ch. N. S. 161.

S. H. Blake, Q. C. The city is the reversioner, and must be before the Court.

COPY OF PLAN No. 380.

CECIL STREET.

STREET.

25	24	23	22	21	20	19	18	17	16
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LANE—20 feet wide.

20 ft.	189 feet 6 in.	22 feet	20 ft.
20 ft.	15	22 feet	20 ft.
20 ft.	194 feet 6 in.	22 feet	25 ft.
20 ft.	14	22 feet	20 ft.
20 ft.	194 feet 6 in.	22 feet	20 ft.
20 ft.	13	22 feet	20 ft.
20 ft.	194 feet 5 in.	22 feet	20 ft.
20 ft.	12	22 feet	20 ft.
20 ft.	194 feet 6 in.	22 feet	20 ft.
20 ft.	11	22 feet	20 ft.
20 ft.	189 feet 6 in.	22 feet	20 ft.
20 ft.	LANE—20 feet wide.	22 feet	20 ft.
20 ft.		22 feet	20 ft.

Lane to be Opened.

HURON

1	2	3	4	5	6	7	8	9	10
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June 23rd, 1883.—FERGUSON, J.—The defendants the Corporation of the City of Toronto, were the owners of certain lands lying within the City known as "The Bowes property," situate on the east side of Huron street, and between Baldwin and Cecil streets. This land was by the corporation sub-divided into building lots which were shewn upon a plan on which was printed: "*Plan of building lots for sale, the property of the Corporation of the City of Toronto.*" There was also printed on the plan, "*Scale 50 feet to one inch. Wadsworth and Unwin, Provincial land surveyors.*" The plan exhibited ten lots numbered from one to ten inclusive, fronting towards the south on Baldwin street; five lots numbered from eleven to fifteen inclusive, fronting towards the west on Huron street, and ten lots numbered from sixteen to twenty-five inclusive, fronting northerly on Cecil street. There was shewn on this plan a lane twenty feet wide at the rear of the lots fronting on Baldwin street; a similar lane at the rear of those fronting on Cecil street, and a lane of the same width in the rear of the lots fronting on Huron street. So that there was a continuous lane or roadway from the easterly side of Huron street round the five lots fronting on Huron street to the easterly limit of that street. The easterly limit of the property so sub-divided is a straight line running along the westerly limit of the property of the late Hon. Mr. Brown. The lots fronting on Baldwin street, and those fronting on Cecil street, are apparently twenty-one feet in width, excepting those lying along Huron street, which are larger. The lane in the rear of the lots fronting on Huron street was opposite the rears of lot 10 on Baldwin street, and lot 16 on Cecil street, and it was contended that each of these lots abutted upon it.

On May 18th, 1881, these lots were offered for sale (that is, to be leased,) at public auction. At this sale the plaintiff became the purchaser of lot number 10 fronting on Baldwin street, and the defendant Mr. Macdonnell became the purchaser of the whole five lots numbered from 11 to 15 inclusive, fronting on Huron street. The sale

was undoubtedly made in fact according to this plan, which was exhibited at the sale, and copies of it apparently given to the bidders, or some of them, for the plaintiff produced a copy of it that he got at the sale. The contract of purchase signed by the plaintiff is in these words: "Toronto, 18th May, 1881. I hereby agree to lease the property described in the plan hereto annexed and marked A, as lot number ten on the north side of Baldwin street, subject to the foregoing conditions of sale, for the sum of 1½% dollars per foot per annum on Baldwin street. (Signed), P. F. CAREY. Witness, T. W. S."

This agreement and the conditions of sale were annexed to a copy of the plan to which I have before alluded, and in part described. At the trial there was some discussion as to whether or not this was a "plan" within the meaning of certain Acts of Parliament. The parties to the contract, however, called it a plan. It is in fact a plan, and I think it clear that the contracting parties incorporated it into the contracts of purchase and sale. It was not made to appear that the defendant Mr. Macdonnell signed a similar contract for the purchase of his lots, but it is fair I think, under the circumstances, to assume that he did, if that is at all material.

Some three or four weeks after the sale, the plaintiff applied to the solicitor for the City for his lease, but it was not ready. He says he applied many times without getting it.

The defendant, Mr. Macdonnell, says that he purchased the whole of the lots fronting on Huron street with the view of closing up the lane in the rear of these lots, but there is no evidence that he or any one disclosed that at the sale. He says he paid higher prices for some of the lots than he would have paid but for this intention. After the sale he applied to the officers of the Corporation having charge of the leasing of the property, to permit him to close up the lane in the rear of his lots, offering to indemnify them and the Corporation against any claim that might be made by any of the lessees of other lots, &c., and for some reason a surveyor's plan was prepared in which the lane

in the rear of the lots fronting on Huron street was not shewn. This appears to be plan No. 352, registered the 9th of June, 1881, and leases to this defendant, Mr. Macdonnell, and purchasers other than the plaintiff, were made and executed according to this plan. The defendant Mr. Macdonnell got his lease according to this plan, and he enclosed the lane in the rear of his lots by fences. During the whole time, and before the making and registration of this plan No. 352, and before the defendant Macdonnell got his lease he had full notice and knowledge of the plaintiff's purchase, the terms of it, his contention, and his rights, whatever they were. The lease to the defendant, Mr. Macdonnell, bears date the 14th day of June, 1881, five days after the registration of the plan 352. The plaintiff was offered a lease according to this plan, but he declined to accept it, and threatened legal proceedings in order to get a lease according to his purchase. An application was made, however, to the property committee of the Corporation (the details of which need not be stated here), the result of which appears to have been (perhaps there were other causes as well) the making and registration of another plan of the property. This is plan No. 380, registered May 19th, 1882. This shows the lane twenty feet wide in the rear of the defendant Mr. Macdonnell's lots in a tinted color, and very plainly marked "*lane to be opened.*" On this plan there is a certificate under the seal of the Corporation, and signed by the then mayor and treasurer in these words: "We hereby certify that this plan represents correctly the manner in which we have dedicated and set apart the rear twenty feet of lots 11 to 15 inclusive, registered plan 352, for the purposes of a public lane." This certificate apparently assumes that by the registration of plan No. 352 the land comprised in the lane in the rear of the defendant Macdonnell's lots became part of those lots, and so gave to him lands that he had plainly not purchased. It is not shewn that any sale was made according to this plan No. 352, although leases were drawn and accepted according to it.

The plan No. 380 exhibits the lanes, lots and boundaries the same as the plan that was exhibited at the sale, and according to which the plaintiff and all the others purchased. The plaintiff was finally offered and he accepted his lease on the 19th of May, 1882, after the registration of the plan 380, and his lot is described in the lease as "being lot number ten (10) on the north side of Baldwin street, according to registered plans numbers 352 and 380." The plaintiff says that he was not satisfied to take this lease, but accepted it owing to private business pressure which could not affect other parties, and need not be further mentioned. He did accept it as the consummation of his purchase, and I think the effect of it is to give to the plaintiff his lot according to a plan exhibiting lots, lanes and boundaries, exactly as they were exhibited upon the plan upon which he made his purchase, and which was incorporated into his contract, it being thought necessary to mention in the lease the plan No. 352, owing to what was apparently assumed in drawing the certificate on this plan, to which I have before alluded; and I am of the opinion that the plaintiff's rights under this lease are the same as if he had been given, immediately after his purchase, a lease of his lot according to a plan identical with the one according to which he made his purchase, and the defendant Mr. Macdonnell can have acquired no rights as against the plaintiff by reason of anything that has been done since the purchase, for he had full notice and knowledge of all the facts, and of the plaintiff's contentions from the beginning, and I think the plan No. 380 is to be considered as incorporated with the plaintiff's lease.

At the trial I found upon the evidence that the lane in the rear of the lots that front on Huron street being situate as it is (as I have endeavoured to point out) with respect to the plaintiff's lot, is of material benefit and advantage to the enjoyment of the plaintiff's lot, and that the closing of it by the defendant Mr. Macdonnell, was and is a disadvantage and injury to the plaintiff, and to the

enjoyment of his lot. I think, from what has been shewn, that he has a greater interest in having this lane open than any other of the lessees, except the owner of lot 16 fronting on Cecil street. Evidence was given to shew the contrary of this, but it appeared to me to rest upon the peculiar ideas of the witnesses. I can entertain no doubt upon the subject.

It was objected that all the persons who made purchases at and took leases pursuant to this sale should be parties to this suit, but I cannot see the force of the objection, I think the plaintiff has such a right as enables him to maintain the suit.

And having examined all the cases to which I was referred, I am of the opinion that the plaintiff has shewn that he is entitled to judgment in his favour. He is, I think, entitled to an order against the defendant Mr. Macdonnell for the removal of the fences and the opening of the lane in question, and to have the same defendant enjoined against any repetition of the acts complained of. He is, I think, also entitled to his costs of suit against this defendant and the defendants the City of Toronto. The defendants, the City of Toronto, are, I think, entitled to no costs. The defendant Mr. Macdonnell will pay such costs as the defendants other than the city (a) may be found entitled to upon taxation. And there is judgment accordingly.

A. H. F. L.

(a) These were the mortgagees of the lot purchased by the plaintiff who had been added as parties to the action.

[CHANCERY DIVISION.]

RE STANDARD FIRE INSURANCE CO.—KELLY'S CASE

Company—Subscriber to stock-book—Allotment of shares—Winding up—Contributories—Constitutional law.

K. signed a stock-book headed as follows: "We, the undersigned, do hereby subscribe for shares of the capital stock of the Alliance Insurance Company, and agree to take the number of shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company 10 per cent. of the amount of stock subscribed by us respectively within thirty days from the day of our several subscriptions." The Act incorporating the Alliance Company vested the shares of the company in the persons who should subscribe for the same. Before any stock was actually allotted to K., the Alliance Company was amalgamated by 46 Vic. c. 58, O., with the Standard Insurance Company, which company was ordered to be wound up.

Held, that K. was rightly made a contributory.

Nasmith v. Manning, 5 S. C. 417, distinguished.

It was contended that K. never agreed to become a shareholder in the Standard Insurance Company, but *Held* that the statute answered this objection, and that being within the jurisdiction of the Local Legislatures, it could not be objected to as unjust.

THIS was a proceeding under the Act respecting insolvent banks, insurance companies, loan companies, building societies, and trading corporations, 45 Vic. c. 23 D., for the winding up of the Standard Fire Insurance Company, with which the Alliance Insurance Company had been amalgamated by statute, by the Court under the provisions of that Act, and the amendments thereto.

On November 27th, 1883, Proudfoot, J., made an order for the winding up of the company, appointing a provisional liquidator, and referring it to the Master of the Supreme Court at Hamilton to appoint a permanent liquidator, and to settle the list of contributories, take the accounts of assets, debts and liabilities, and all other necessary accounts, and make all necessary inquiries and reports for the winding up of the business of the companies under the provisions of the said enactments.

Pursuant to these directions the Master proceeded to settle the list of contributories, and amongst others found that one P. D. Kelly was the holder of five shares

of the capital stock of the company, the circumstances of his case being as are stated in the judgment of Ferguson, J.

Kelly now moved before a Judge in Chambers by way of appeal from this finding of the Master upon the following grounds: (1.) That the evidence shewed that he was induced to sign the subscription book of the Alliance Insurance Company, which was presented to him by Jarvis, the agent, upon certain representations made by the said agent, which turned out to be untrue in fact: that he never understood that he was signing a subscription book of the Alliance Insurance Company, but, on the contrary, thought it was merely a memorandum book of the agent: the book was signed under a mistake of fact and should not be held in any way binding upon him: (2.) that the document signed by him purported to be an agreement to take shares of the capital stock of the Alliance Insurance Company; but no consideration for such an agreement appeared in the said document, which, moreover, was not under seal, and was therefore invalid and void: (3.) that the alleged agreement was void for want of mutuality, as there was no agreement on the part of the company to allot the said shares to him: (4.) that if the said document could be construed to be an application on his part to take five shares of the said company's stock, then it became the duty of the Company to accept the said application within a reasonable time, to allot the five shares to him, and to give him notice of such allotment: that the *onus* of shewing the said acceptance, allotment, and notice was on the company, but no evidence thereof was given by them, while he received no notice of allotment: (5.) that he never consented to the amalgamation of the Alliance Insurance Company, and could not be bound as a shareholder in any other company than the one in which he was alleged to have subscribed,

The motion was made on April 4th, 1884, before Ferguson, J., in Chambers, when it was adjourned into Court, and there argued on April 24th, 1884, before the same learned Judge.

A. Galt, for the appellant. The company should have shewn allotment and notice of such allotment: *In re Universal Banking Corporation, Gunn's Case*, L. R. 3 Ch. 40; *Nasmith v. Manning*, 5 S. C. 417; *In re Constantinople, &c., Hotel Co., Redpath's Case*, L. R. 11 Eq. 86; *Re Charles Laffitte & Co. De Rosaz's Case*, 21 L. T. N. S. 10. There is no consideration, and the agreement is not under seal: *Ramsgate Victoria Hotel Co. v. Montefiore*, L. R. 1 Ex. 109. There has been a delay of five months without acceptance, which is fatal: *In re National Savings Bank Association, Hebb's Case*, L. R. 4 Eq. 9; *In re Universal, &c., Ins. Co., Ritso's Case*, 4 Ch. D. 774; *Fry on Spec. Perf.*, 2nd ed., secs. 284, 285. Then Kelly never consented to the amalgamation, and never consented to be a shareholder in the Standard Company. See *In re Empire Assurance Corporation, Ex parte Bagshaw*, L. R. 4 Eq. 341; *Clinch v. Financial Corporation, Ib.* 5 Eq. 450; 46 Vict. ch. 58, O.

Laidlaw, contra. As to the necessity of allotment, there are in England proposals or applications, which are not binding until allotment and notice, but that is not so in this country.

April 25th, 1884. FERGUSON, J.—The book which Kelly subscribed contains over his signature these words, and they are in fact what he did subscribe to: “We the undersigned do hereby subscribe for shares of the capital stock of the Alliance Insurance Company, and agree to take the number of shares, and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company ten (10) per centum of the amount of stock subscribed by us respectively, within thirty days from the date of our several subscriptions.”

It was contended that this was only an application for stock, and that an allotment of stock, and notice of such allotment to Kelly was necessary in order to bind him; and *Nasmith v. Manning*, 5 S. C. 417, was, amongst many others, relied upon in support of this contention.

The case is, I think, materially different from *Nasmith v. Manning*. In that case an allotment was plainly contemplated by the parties, and the document signed contained a promise to pay the ten per cent. upon the allotment being made.

In this case the document signed does not mention or refer to any allotment, and the promise is to pay the ten per cent, within thirty days from the date of the subscription, and each subscription in the book produced (which is the one signed by Kelly) contains the date on which it was made. Kelly's name, occupation, residence, and the amount and date of his signing are all written in this book by himself. There does not appear to have been any further act of the Company contemplated to be done previous to his liability on his promise to pay the ten per cent. of the amount of his subscription. The operative words in the document are different from those in *Nasmith v. Manning*; and there are many other differences between the cases.

After having examined the authorities referred to, but without being able to reconcile all the statements of the learned Judges, appearing in them, I am of the opinion that the transaction was one in which stock in the company was offered to Kelly, and that he took it and subscribed for it, and became then a stockholder, and liable to pay the ten per cent. upon his stock at the expiration of thirty days from the date of his subscription; and I think the document that he signed is not, as contended, simply an application for stock, but a subscription for stock; and that he then got the stock as the consideration for his liability. And I think his contention as to alleged misrepresentations by the agent, at the time of his subscription, even if they could have any effect in his favour here, entirely fails, and I am of the opinion that Kelly was a shareholder in the Alliance Company. The second section of 38 Vic. c. 66 vests the shares in the persons who shall subscribe for the same, &c. This is the Act incorporating the Alliance Company. It was also contended, on behalf

of Kelly, that he never agreed to become, and did not become, a shareholder in the Standard Company.

I cannot but think that the Amalgamation Act, 46 Vic. c. 58, answers this contention. It was argued that this Act is unjust and therefore unconstitutional. It was not at all contended that the subject, as a matter of legislation, was not within the sphere of the authority of the Local Legislature. It was admitted that it was within this sphere, and this seems to me to put an end to the contention, for I apprehend that acting within the bounds of its legislative jurisdiction, the Local Legislature is as omnipotent as any Parliament. The conclusion at which I have arrived is, that Kelly is a shareholder in the Standard Company, and that his appeal should be dismissed, with costs.

A. H. F. L.

This case has been carried to the Court of Appeal.

[CHANCERY DIVISION.]

SHANAGAN V. SHANAGAN.

Conveyance void for improvidence and want of professional advice—Terms of setting aside—Compensation for improvements under—Payment by grantee of mortgage debt on land conveyed—Occupation rent—Accounts.

On August 30th, 1875, the plaintiff, an illiterate man, over 75 years old, voluntarily conveyed his farm to the defendants, his sons. On the same day the defendants leased the farm to the plaintiff for the term of his natural life, reserving no rent. On September 23rd, 1875, the plaintiff leased to D., one of the defendants, but for the benefit of both, the said farm for the term of his, the plaintiff's, life, reserving a rent of \$100 a year, and "the proper board, clothing, and lodging" of the plaintiff "so long as he remains on the premises," and by the same deed transferred to D. all the goods and chattels on the farm. The defendants, thereupon, went into possession of the farm, on which the plaintiff also continued to reside, and before action brought had built a house on it, and made sundry improvements.

Held, that upon the evidence set out in the case, the grant of August 30th, 1875, and the lease of September 23rd, 1875, must be set aside on grounds of improvidence, and want of proper professional advice.

Held, however, that though it appeared that the defendants had made serious default in regard to the lease of September 23rd, 1875, and had been guilty of violence and ill-treatment towards the plaintiff, yet the above relief could only be granted upon the terms of the defendants being repaid all sums expended in improvements, and repairs of a permanent and substantial nature by which the present value of the farm was enhanced, with interest from the time these sums were actually disbursed; also the moneys paid by them to keep down the interest of a certain mortgage, which had existed on the farm ever since its original purchase by the plaintiff, and any principal moneys thereof paid by them; also of the defendant D. being repaid rents paid to the plaintiff, and the value of such maintenance as he had given to the plaintiff, but that on the other hand, the defendants must be charged with deterioration, to be set off against improvements. and with rents and profits of all kinds received by them, and with an occupation rent, and also with the value of the chattels mentioned in the lease, and given up to them by the plaintiff.

THIS was an action brought by Denis Shanagan against his two sons, Denis Shanagan the younger and John Shanagan, seeking to have a certain deed of grant from the plaintiff to the defendants declared void, and delivered up to be cancelled, and a certain lease from the plaintiff to the defendant Denis rectified so as to properly secure to the plaintiff the rent mentioned therein, or in the alternative, delivered up to be cancelled, under the circumstances mentioned in the judgment.

The action was tried at the sittings of this Court at London, on November 28th, 1883, before Ferguson, J.

E. R. Cameron, for the plaintiff referred to : *Haguenin v. Baseley*, and the notes thereto, 2 W. & T. L. C. 4th Am. ed. p. 1156 ; *Lavin v. Lavin*, 27 Gr. 567 ; *Mason v. Seney*, 11 Gr. 447 ; *Hume v. Cook*, 16 Gr. 84 ; *Beeman v. Knapp*, 13 Gr. 398 ; *Irwin v. Young*, 28 Gr. 511 ; *Donaldson v. Donaldson*, 12 Gr. 431 ; *Dutton v. Thompson*, L. R. 23 Ch. D. 278 ; *Turner v. Collins*, L. R. 7 Ch. 329.

John Cameron, for the defendants referred to *Armstrong v. Armstrong*, 14 Gr. 528 ; *McConnell v. McConnell*, 15 Gr. 20 ; *Johnston v. Johnston*, 19 Gr. 133.

The following authorities were also referred to : *Scott v. Hunter*, 14 Gr., 376 ; *Johnston v. Johnston*, 17 Gr. 493 ; *Carroll v. Robertson*, 15 Gr. 173 ; *Kilborn v. Workman*, 9 Gr. 255.

January 26th, 1884. FERGUSON, J.—The plaintiff is the father of the defendants and is wholly illiterate, and as he says is between seventy-five and eighty years old. Before the conveyance of it to his sons, the defendants hereafter mentioned, he was the owner of the east half of lot No. 9 in the sixth concession of the township of Metcalfe, subject to a mortgage thereon in favour of the Canada Permanent Loan and Savings Company, made by one Kilbride a former owner, from whom the plaintiff purchased, to secure an advance of \$1500. At the time of the conveyance to the defendants the land was of the value of, as I gathered from the evidence, something less than \$4000. It is now of the value of about \$6000, the increase in value being from two causes, the fact that lands in the neighbourhood have risen in value and by reason of some permanent improvements having been made upon it.

On the 30th day of August, 1875, the plaintiff made a conveyance of this farm to his sons the defendants. The conveyance is in the usual short form. The expressed consideration is \$1800, but it is not claimed that any

money consideration was paid or intended to be paid. On the same day a lease of the farm was given by the defendant to the plaintiff for the term of his natural life. This is for the expressed consideration of \$5, and by it no rent is reserved.

On the 23rd day of September in the same year, (1875), a lease of the farm was executed by the plaintiff to the defendant Denis Shanagan for the term of the natural life of the plaintiff, reserving a rent of \$100 a year, and "the proper board and clothing and lodging" of the plaintiff "so long as he remains on the said premises," and this document professes to transfer and set over to the defendant Denis Shanagan, "all the stock agricultural implements and household furniture, and all other goods and chattels of whatever nature and kind" then on the farm or in the buildings thereon.

The plaintiff had at this time a wife and several infant children. Both the defendants went into possession of the farm in pursuance of the lease to the defendant Denis, and I gathered from the evidence and the circumstances that this lease was as between the defendants to be for the benefit of both of them, and was given by the plaintiff to the defendant Denis, because Denis was in better favour with his father than was the defendant John.

This action is brought to set aside the conveyance of August 30th, and to have the lease of September 23rd, 1875, reformed or set aside. The plaintiff has, as he states in his evidence, no recollection of having executed the conveyance of August 30th, at all. This farm and the chattels upon it were the only property the plaintiff had. The plaintiff asks to have this declared void on the grounds that the transaction was improvident and made without any independent professional advice, and for no consideration. It is asked that the lease of September 23rd, be reformed or declared void. I do not under the circumstances see any possibility of reforming it, and I think it was a mistake of the plaintiff to ask this relief. The statement of claim however asks to have it declared void

and cancelled, and the case was conducted before me as if this was what was asked and the granting of it resisted, the grounds urged by the plaintiff's counsel being improvidence, the want of professional advice and undue influence, and that as to the chattels mentioned in it there was no consideration whatever.

These chattels consisted of horses, a wagon, ploughs, cows, calves, wheat, potatoes, oats, barley, &c., &c., and were of very considerable value, apparently between \$600 and \$1000, but the evidence of this value given before me was only of a general character.

The defendants have in some way supported the wife and infant children of the plaintiff, though no provision appears to have been made for this in the transactions sought to be impeached. The members of the family that were called as witnesses seemed to have an inclination against their father and in favour of the defendants. It is alleged, and I think proved, that the defendant Denis Shanagan made serious default in not observing and performing his contract to provide for his father according to the stipulation in this respect in the lease to him of September 23rd.

The plaintiff says that the defendants, his sons, beat and illtreated him on several occasions, and this according to what he says in a somewhat cruel manner. The defendant Denis in his evidence admits that he had been often before the Police Court in Strathroy on a charge of his having beaten his father, but he says that he was "never in the wrong" in these instances. The defendants seem to me to have a most erroneous idea of what under any circumstances is their duty towards their father. They appear to think that when they consider his conduct unreasonable they are justified in illtreating, I may say abusing him. It was stated in the evidence that the plaintiff after he made the lease to the defendant Denis began to drink immoderately, and that this gave rise to differences between him and the defendants, but to what extent this occurred I am unable to say.

The defendants have erected a new house on the farm, in which they and some of the members of the family reside. The plaintiff still resides in the old house, and I think it sufficiently appears that he has not been well provided for.

At the close of the case I intimated an opinion that both the conveyance of August 30th, and the lease from the plaintiff to the defendant Denis, should be set aside on the grounds of improvidence, want of independent professional advice, and absence of consideration. I thought that there was also undue influence, but this was not perhaps clearly proved; and I am still of the same opinion. The case was only reserved for the purpose of considering the terms on which the transactions should be set aside. Counsel for the plaintiff contended that if the transactions were set aside the defendants would be entitled to be paid for the permanent improvements made by them upon the land, but not to the enhanced value by reason of the rise in value of the lands in the neighbourhood. I do not think it necessary further to state the evidence or to quote from the authorities cited, many of which are cases known to almost all practitioners. I am of the opinion that both the conveyance of the 30th of August, 1875, and the lease from the plaintiff to the defendant, Denis Shanagan, should be declared void, and be ordered to be delivered up to be cancelled.

As to the terms on which this should be done: There is no purchase money to be repaid by the plaintiff. The defendants are entitled to be paid all sums of money laid out in improvements and repairs of a permanent and substantial nature by which the present value of the farm is improved, with interest from the time these sums were actually disbursed. The defendants are, I think, also entitled to be paid the moneys paid by them to keep down the interest on the mortgage on the farm, and any principal money on this mortgage that they may have paid, (the evidence before me seemed to show that the principal

money had not been diminished by payment to any considerable extent) but care must be taken that the defendants are not allowed moneys actually paid by them in cases where the money virtually belonged to the plaintiff. I mention this because it appeared to me at the trial that the defendants were claiming to have paid and to get the benefit of the payment of moneys which I thought virtually belonged to the plaintiff; such a case may not, however, arise in taking the accounts.

I think the defendant Denis Shanagan is entitled to be repaid the rents that he has paid to the plaintiff, and the value of such maintenance as he has given the plaintiff. I say the defendant Denis because the lease is in form to him, though I think it was for the benefit of both defendants. The Master can deal with this.

The defendants must on the other hand be charged with deteriorations, which will be set off against improvements; they must be charged with rents and profits of all kinds received by them, and also with an occupation rent for the premises or part of the premises, as the case may be, occupied by them, and they or the defendant Denis (as the Master may determine) must pay or be charged with the value of the chattel property mentioned or referred to in the lease, which was given up by the plaintiff. All proper allowances are to be made in respect of interest. For the purposes of these accounts there will be a reference to the Master at London, who in taking the accounts need not necessarily be confined to the items of account that I have mentioned.

As the conveyance of the land is declared void a reconveyance of the legal estate does not seem to be necessary, but if necessary it should, of course, be ordered.

The defendants must pay the plaintiffs costs of the suit up to and inclusive of the judgment. Although one can see the possibility of concluding this litigation without incurring the costs of bringing the parties before the Court again, yet as complications may arise in respect to the accounts, and as it appears to me to be a case in which the

Master may report specially as to some matters, I think it prudent to reserve further directions and subsequent costs till after report.

Judgment accordingly.



A. H. F. L.

[CHANCERY DIVISION.]

ROSS V. MALONE ET AL.

Execution— Fi. fa. lands—Sale by sheriff before return nulla bona—R. S. O. ch. 66, sec. 15.

Held, under the circumstances of this case, that a sale under a *fi. fa.* against lands conferred a good title on the purchaser, although the *fi. fa.* against goods had not been returned *nulla bona* under R. S. O. ch. 66, sec. 15.

It appeared that the sheriff would have returned the writ *nulla bona* if called upon to do so ; that the judgment debtor had no goods in the county during the currency of the writ against goods, and that the plaintiff endeavouring to set aside the sale, being a mortgagee, would, if he had made the proper searches, have found the writ against lands in the sheriff's hands.

THIS was an action brought by one Charles Hammond Ross, for the reformation of a certain mortgage under the circumstances which are fully set out in the judgment. The defendants were Edward Malone, William Giffin, and William Boys.

The action was tried at Barrie, on September 15th, 1884, before Ferguson, J.

Lount, Q. C., for the plaintiff, produced the consent in writing of the defendant Malone, that judgment might be entered reforming the mortgage, and for immediate foreclosure. It was witnessed by a subscribing witness, who made an affidavit to the signature before a notary public in the United States. The learned Judge, however, withheld judgment until he should hear the evidence, which was accordingly given.

Lount, Q. C., for the plaintiff. The sale of the land was wholly void; the *fi. fa.* against goods was returned only as expired. I refer to *Oswald v. Rykert*, 22 U. C. R. 306; *Ontario Bank v. Muirhead*, 24 U. C. R. 563; *Ontario Bank v. Kerby*, 16 C. P. 35; R. S. O. ch. 66, sec. 15.

Pepler, for defendant Boys. There is no pretence that any one was injured by the fact of the non-return of *nulla bona*, if it is a fact. The sale was perfectly regular. I rely on *Mandeville v. Nicholl*, 16 U. C. R. 609; C. S. U. C. ch. 22, sec. 252; *Doe d. Spafford v. Brown*, 3 O. S. 92. These shew the statute is only directory not imperative. See also *Eades v. Maxwell*, 17 U. C. R. 173; *Doe d. Meyers v. Meyers*, 9 U. C. R. 465; *Harwood v. Phillips*, *Bridgman*, 465.

Lennox, for the defendant Giffin.

Lount, Q. C., in reply. The plaintiff was ignorant of the existence of the writ in the sheriff's hands. No doubt he should have searched; but the defendants should also have searched, and would have found the improper return. The whole case depends upon whether or not the defendant took a good title by the sale under the writ.

October 18th, 1884. FERGUSON, J.—The action is for the reformation of a mortgage from the defendant Malone to the plaintiff for securing a small sum of money, \$270 or thereabouts, and interest from October 10th, 1878, the day of the date of the mortgage, by correcting the description of lands therein mentioned so as to make such description read the north half of lot number seventeen in the fifth concession of the township of Nottawasaga, instead of the south half of the same lot, as at present in the mortgage, on the ground of a clerical error or mutual mistake in the drawing of the mortgage; and for a foreclosure of the mortgage when reformed in default of payment by the defendant Malone. There are other lands embraced in this mortgage, but there seemed to be no contention as to these. This mortgage was duly registered on the 12th day of October, 1878, two days after its date.

On the 24th day of September, 1878, writs of *fiery facias* against the goods and lands of the defendant Malone, were duly placed in the hands of the sheriff of the County of Simcoe to be executed. By these writs the sheriff was commanded to levy \$67 or thereabouts, which amount was said to be for costs in a suit *Boys and another v. Malone*.

On the 9th day of September, 1879, the sheriff advertised the lands for sale, and on the 15th day of December, in the same year, they were offered for sale, but there were no bidders for them, and the sale was postponed to the 22nd of the same month. In the meantime, and on December 17th, a writ of *ven. ex.* was issued, and placed in the hands of the sheriff, and on the 23rd day of December, 1879, the lands (the north half of lot No. 17, in the 5th concession of Nottawasaga) were sold by the sheriff to Francis Rye, one of the solicitors for the plaintiff in the suit in which the executions were issued. And on the 12th day of April, 1880, the sheriff executed a conveyance to Rye. The consideration paid by Rye was, as appears by the deed of conveyance, \$55.

On the 21st day of October, 1880, Rye sold and conveyed the lands to the defendant William Giffin for the consideration of \$400. The deed from the sheriff to Rye was registered on the 15th day of May, 1880, and the one from Rye to Giffin was registered on the 26th day of October, 1880. The defendant Giffin afterwards mortgaged the lands to the defendant Boys to secure a sum of money said to be between \$300 and \$400. The plaintiff also asks that the deed from the sheriff to Rye and from Rye to Giffin, and the mortgage from the defendant Giffin to the defendant Boys, may be declared void and to be clouds upon the plaintiff's title under his mortgage; that the registration of the same and each of them may be cancelled, and that the defendants Boys and Giffin may be ordered to pay the costs occasioned by reason of such deeds and mortgage, and their claiming title under the same. The plaintiff also asks for an order for immediate possession of the lands.

The defendant Malone consents to the judgment asked by the plaintiff. The ground upon which the plaintiff asks that the deeds and mortgage should be declared a cloud upon his title is that there was not, before the sale by the sheriff to Rye, any return of *nulla bona* in whole or in part with respect to an execution against goods (in the suit or matter in which was the execution against lands under which Rye bought) by the same sheriff, as required by the 15th section of R. S. O., ch. 66, which says: "No sale shall be had under any execution against lands until after a return of *nulla bona*, either in whole or in part, with respect to an execution against goods in the same suit or matter by the same sheriff." Counsel for the plaintiff admitted that unless he could succeed upon this contention he could not succeed against the defendants Giffin or Boys, for they had not, nor had Rye, any notice of the right or claim the plaintiff now contends for. There were many contentions and much argument before me. Counsel for the plaintiff, however, said that the whole case depended upon the decision of this question under the statute, and upon the facts of the case as to whether there was a return of *nulla bona* before the sale by the sheriff to Rye.

On the writ against goods there appears to be endorsed,

" *Nulla bona.*

" Expired,

" The answer of,

" J. D. McConkey,

" *Sheriff, C. S.*"

" Fee, 75c."

The evidence of the deputy-sheriff respecting this alleged return is, that the writ was placed in the sheriff's hands on the 23rd of September, 1878, and that on the 23rd of October, 1879, it was returned, "expired;" that the return upon the writ is "expired," and not *nulla bona*;" that the sheriff's fee when he makes a return *nulla bona* is \$1.50, and when he returns a writ "expired" it is 75c.;" that the word "expired," and the subsequent words, except

the signature, are in the hand-writing of one Beaseley, who was in the sheriff's office; that he does not know the writing in the words, "*nulla bona*," and that the writing is different from Beaseley's, but is somewhat like it. He says he never made a return "*nulla bona* and expired," and his idea is, that a writ cannot be returned *nulla bona* when or after it has expired. He says, of course, much more on the subject of the writs; this, however, is what is important respecting the immediate subject. The evidence of the sheriff is as clear as could be expected to be under the circumstances. He does not speak from a recollection of the fact of making and signing this particular return, but he says that he never made or signed any return like this, and that he feels entirely certain that when he signed this return the words, "*nulla bona*," were not there. He also thinks that he could not return *nulla bona* and expired, and that he could not make a return *nulla bona* after the writ had expired. He also says that the man Beaseley (who, it was said, is not now in this country) was not his deputy, and that he never had any authority to sign any paper for him.

On the evidence that was adduced on the subject, taking the whole of it, including the appearance of the return endorsed on the writs, I am entirely satisfied that the words "*nulla bona*" were not there when the sheriff made his signature, and that the writ was not in fact returned "*nulla bona*." When, where, or by whom these words were written I know not, but I am satisfied the true finding upon the evidence is, that the writ was not returned "*nulla bona*," and I so find.

There was much argument as to whether or not a sheriff can make a return *nulla bona* after the expiry of the writ; but having found on the evidence as I have, I need not consider this question. The opinions of the sheriff and his deputy were only important as affording an argument or inference against either of them having made such a return.

Then the lands were in fact sold before any return

nulla bona, as mentioned in the 15th section of the Act. Counsel were both agreed that there has not been any subsequent legislation on the subject, and I do not know of any.

It was, however, contended for the defence, that the words of the Act are directory, and that inasmuch as the sheriff was, from all the information he could gain on the subject, of the opinion that he would, before the expiry of the writ, have returned it *nulla bona*, if he had been asked for return of it, the sale should be maintained as good by the 14th section of the Act, R.S.O. ch. 66, which is as follows: "Any person who becomes entitled to issue a writ of execution against goods and chattels may at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable, and deliver the same to the sheriff to whom the writ against goods is directed, at or after the time of the delivery to him of the writ against goods, and either before or after any return thereof." And the writs of execution against goods and lands seem, for anything that has been said to the contrary, to have been properly in the hands of the sheriff at the time the plaintiff took his mortgage, and at that time the writ against lands was for anything that appears a valid charge upon the lands in the county of the defendant Malone, and hence upon the lands in question. If the plaintiff had made the proper searches he must have become aware of this. His contention seems to me to come to this, that being affected with notice of a valid charge upon the lands he, nevertheless, took his mortgage, and had the sale upon the writ that constituted such charge been regularly and properly made and carried out, he would have lost the benefit of his mortgage so far as these lands were concerned, but that he has discovered a mistake or error by reason of the *fi. fa.* goods not having been returned *nulla bona* according to the provisions of section 15 of the Act. This case, looking at it in this way, does not present a very strong equity in his favour, for even if he had made no mistake in the taking of his mortgage, and there had

been no mistake in not obtaining the return *nulla bona* before the sale, the land in question would have gone from the plaintiff.

There are very strong reasons for thinking that the defendant Malone had not, during the currency of the writ against goods, any goods and chattels in the county out of which the money or any part of it could have been made, for in addition to the opinion given by the sheriff that I have before mentioned, which seemed to me to be founded partly on the fact that the letters N. B. were put by one of his officers in the margin of his book opposite the entry of the writ, which he says was a usual thing to be done in the office, when it was ascertained that the defendant had not any goods, there is the fact that another writ against goods issued in the same suit as this one for the sum of about \$1,200, was, on the 29th of October, 1879, nearly two months before the sale, placed in the sheriff's hands, which was afterwards renewed, and eventually returned *nulla bona*, this return being long after the sale in question.

The defence did not, however, by the pleading set up that the fact was that Malone had no goods, so far as that may be considered material, so that the plaintiff might shew that he had goods to answer the amount of the claim on the writ in question. Nevertheless it is not, I think, unreasonable to conclude from what appeared before me that the fact was that Malone had not any goods, and that not obtaining the return *nulla bona* before the sale was a mere oversight.

On the evidence given by the plaintiff, in regard to the mistake in taking the mortgage, I am of the opinion, although some pointed arguments were made against it, that he proved a case sufficiently strong to show such mutual mistake as would, in an ordinary case, be sufficient to justify a reformation of the mortgage so as to make it include the half lot of land in question. In such a case, clear and convincing testimony is necessary to show that there was an agreement different from the document, and

that by a mutual mistake that agreement is not expressed in the document sought to be reformed. In this case much was left to the solicitor, and from his testimony there is not, I think, room for a reasonable doubt that both parties to the transaction intended that this half lot should be embraced in the mortgage. He was acting for both parties, and he says it was he who made the mistake, and that he did not discover it for more than a year afterwards, and, besides, there is no conflict of testimony about it. There is no evidence against the evidence of the solicitor.

Counsel for the defendant relied upon the case *Doe d. Spafford v. Brown*, 3 O. S. 92, and a number of cases subsequently decided recognizing the decision as good law. That case was decided under the Act 43 George 3rd, ch. 1, sec. 1, which says that: "From and after the end of this present session of Parliament, goods and chattels, lands and tenements, shall not be included in the same writ of execution, nor shall any such process issue against the lands or tenements until the return of the process against the goods and chattels," and it was held that it was irregular to issue a *fi. fa.* against lands until after the return of the execution against goods, but that as it was only an irregularity a purchaser at a sheriff's sale under the writ against lands could not be affected by it. The words of that Act are negative in form: "nor shall any such process issue against the lands and tenements until" &c., as also are the words of the present Act: "No sale shall be had under any execution against lands until," &c.

I think some at least of the remarks of the late Chief Justice Robinson, on page 95, are apposite here, specially where he says: "The title of a purchaser at sheriff's sale cannot, we think, be affected by it" (the irregularities in question), "inasmuch as the sale was made upon an execution not void upon the face of it, and issued upon a judgment valid and unsatisfied." And again where he says: "It is further to be observed here, that the lands were not sold under a *fi. fa.* issued too soon, but under an *alias fi. fa.* against lands issued long after the return day of the writ against goods."

That case was referred to in the case of *Mandeville v. Nicholl*, 16 U. C. R., at p. 613, where the same objection was held to be immaterial. It is again referred to and recognized as law in the case of *Eades v. Maxwell*, 17 U. C. R., at p. 180, and there are other cases in which it is also referred to.

The counsel for the plaintiff contended, and, I thought with much force too, that *Doe d. Spafford v. Brown* afforded no guide to the proper decision of the present case, because the fact of the sale was what took the defendant's land from him, whereas the issue of the writ under the former statute was only a part of the proceedings, and the lands could not be sold under it for the period of twelve months after its receipt by the sheriff. At that time, however, there could not properly be a writ against goods and one against lands in the hands of the sheriff at the same time, both issued upon the same judgment, and the provision was that the writ against lands should not issue till after the return of the writ against goods.

Now the two writs may be in the hands of the sheriff at the same time, and the provision is, that the sale of the lands shall not take place till after the return *nulla bona* of the writ against goods, and it appears to me that the two positions are not nearly so far apart as was contended, and after having had an opportunity of examining all the authorities referred to by counsel in prolonged and skilful arguments, I have arrived at the conclusion that the sale of the lands under the writ in question by the sheriff to Mr. Rye was not a nullity, and that the defect in the proceedings, namely, the want of a return *nulla bona* to the execution against goods before the sale, was only an irregularity, and not fatal to the validity of the sale.

Before arriving at this conclusion I examined, I think, with care the cases relied on by the plaintiff without finding them, or any of them, to be, in my opinion, in point to sustain his position.

I have also examined the authorities relied on by the defendants in support of their other contentions, but as to

these contentions I do not think it necessary to decide anything, for as before stated, it was admitted by plaintiff's counsel that if Rye took any title by his purchase the plaintiff could not succeed, and, as I have said, I think he did, notwithstanding anything that has been made to appear to the contrary, take a title by it. The result is, that the action must be dismissed, and, after some consideration of the matter, I do not perceive any sufficient reason for withholding costs. The action is dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

HOPKINS V. HOPKINS.

Husband and wife—Moneys advanced by wife to husband—Contract for re-payment.

A woman, married to her husband in 1880 without marriage settlement, afterwards advanced certain moneys to him, which she now sought to recover as money lent. She failed, however, to prove a contract for re-payment.

Held, that she could not recover.

THIS was an action brought by Hannah A. Hopkins against Silas T. Hopkins. The writ was issued on October 11th, 1882, and in her statement of claim the plaintiff stated that on or about November 7th, 1880, she lent to the defendant the sum of \$300, and on or about December 15th, 1880, the further sum of \$600, and the further sum of \$200 on or about August 14th, 1881, making in all the sum of \$1,100: that no times were specified or agreed upon between herself and the defendant as to the date of re-payment of the said loans, but the same were re-payable on demand: that she was entitled to be paid the said sums by the defendant, but this had not been done; and she

claimed \$1,100 in respect of such principal money so lent by her to the defendant, and interest thereon.

By his statement of defence, the defendant said the plaintiff was his wife, married to him in October, 1880, and at the dates mentioned in the statement of claim, he and the plaintiff were living together as husband and wife: that none of the moneys alleged by the plaintiff to have been lent by her to him were the separate estate of the plaintiff, nor were the wages or personal earnings of the plaintiff, or any acquisitions therefrom, or the proceeds or profits from any occupation or trade carried on by the plaintiff separately from her husband, or derived from any literary, artistic, or scientific skill, or any investments of such wages, earnings, money, or property, settled to her separate use, free from the debts and control of her husband. He denied that the plaintiff lent him the sums mentioned, or that the said sums were re-payable by him to her.

The effect of the evidence adduced sufficiently appears from the judgment.

The action was tried at Hamilton, on April 16th, 1883 before Ferguson, J.

It was admitted that there was no marriage settlement between the parties.

B. B. Osler, Q. C., and *Carscallen*, for the plaintiff. The money was not intended as a gift. Either the plaintiff should recover in *assumpsit*, or as in *McGuire v. McGuire*, 23 C. P. 123, on the ground that there has been a breach of trust by the husband. We refer also to R. S. O. c. 125, secs. 5 and 20; *Hill v. Thompson*, 17 Gr. 445; *Consolidated Bank of Canada v. Henderson*, 29 C. P. 549; *Carroll v. Fitzgerald*, 6 A. R. 93.

C. Moss, Q. C., and *Lazier*, for the defendant. The cases have only gone to the length of allowing an agreement between the husband and wife to take effect as against third parties. The Act R. S. O. c. 125, contains no general powers to the wife to contract, and the power is

confined to the special cases mentioned. It is an enabling Act only. See *O'Doherty v. The Ontario Bank*, 32 C. P. 285. The money was not lent. It was placed in the husband's hands for the mutual benefit of husband and wife, and is altogether outside the statute. Sec. 20 of R. S. O. c. 125, was for the purpose of doing away with the necessity for a next friend; and it does not apply, because the case is removed from the operation of the Act. If the action can be maintained at all it must be upon the clearest evidence. We submit there can be no implied contract. See *Hause v. Gilger*, 52 Penn. 412; *Re Ritchie, Sewery v. Ritchie*, 23 Gr. 66. *McGuire v. McGuire*, *supra*, is in defendant's favour. The trusteeship mentioned there could only apply to the kind of property in that case. We also refer to *The Royal Canadian Bank v. Mitchell*, 14 Gr. 412; *Wright v. Garden*, 28 U. C. R. 609; *Kræmer v. Gless*, 10 C. P. 470; *Furness v. Mitchell*, 3 A. R. 510; *Clarke v. Creighton*, 45 U. C. R. 514.

B. B. Osler, Q. C., in reply. Even if the money was in the husband's possession with the wife's consent, yet he was a trustee as in *McGuire v. McGuire*, *supra*. See also *Re Miller*, 1 A. R. 393; *Woodward v. Woodward*, 9 Jur. N. S. 882.

October 22nd, 1883. FERGUSON, J.—After having perused all the authorities referred to, I am of the opinion that the decision of this case must be mainly upon matters of fact.

In the case *Woodward v. Woodward*, 9 Jur. N. S. 882, referred to by counsel for the plaintiff in his concluding argument, Lord Westbury said: "I do not go so far as to say that in the bare case of a sum of money, part of the income of her separate estate, being handed over by the wife to the husband, this Court would of necessity raise an assumpsit for the re-payment; but it is quite clear and well settled that if money part of the income of her separate estate be handed over by the wife to the husband upon a contract of loan, she may sue her husband in respect of that contract."

That case was referred to in the judgment of Mr. Justice Patterson, in *Re Miller*, 1 A. R. 396, where it was said that clear and convincing evidence of the *bona fides* of the claim and the alleged loan should be rigidly required. That was, however, the case of proving a claim in insolvency proceedings, virtually a case against the creditors of the husband.

In *Story's Equity Jurisp.*, sec. 1373, also referred to to in *Re Miller*, *supra*, it is said that the wife may become a creditor of her husband by acts and contracts during marriage ; and her rights, as such, will be enforced against him and his representatives ; and in putting his example the learned author says she would be deemed a creditor or surety for her husband, if so originally understood between them.

It appears to me from all the authority I have been able to find on the subject, that to enable a wife to recover from her husband for her money which she let him have during the coverture, she must prove a contract for the re-payment of it, and in the view that I have taken of this case it is not necessary for me to say whether or not she could in that case recover against him. This action is brought by the wife to recover money lent, as she in her pleadings says, to her husband, and she says that no time was specified or agreed upon for the re-payment of the money, but that it was payable on demand.

The evidence is all in writing, being by consent certain examinations of the parties, plaintiff and defendant. This was read by counsel. I have since the trial perused it with much care, and I am entirely unable to arrive at the conclusion that the plaintiff has proved that the money, the repayment of which, with interest, she sues for, was lent by her to the defendant, or that any contract whatever was made for the repayment of it. In my opinion the evidence establishes the contrary of this, and I must find accordingly. I think the evidence establishes as a fact that the money was not lent to the defendant, and no contract on his part is shewn for the payment of it.

Under such circumstances I am of the opinion that the plaintiff cannot recover, and, great as the hardship upon her may, in the light of facts incidentally disclosed, appear to be, the action must, I think, be dismissed. At present I say nothing as to costs. As to these I will, if desired, hear counsel. Action dismissed.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA V. BAIL.

Forgery—Alteration of Dominion note—31 Vic. ch. 46 (D.)—32-33 Vic. (D.), ch. 19, sec. 10.

Held, that the alteration of a \$2 Dominion note to one of the denomination of \$20, such alteration consisting in the addition of a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted therefor.

THE prisoner, indicted with one LeBlanc, was convicted at the sittings of the High Court of Justice for the trial of civil and criminal causes, held at Ottawa on 23rd October last, before Cameron, C. J. C. P., of having unlawfully and feloniously altered a Dominion note of the denomination of two dollars, the alteration consisting in the addition of a cypher after the figure "2," wherever that figure occurred in the margin of the note.

The note, in its true and unaltered state, for the purpose of the question hereinafter stated, sufficiently appears as follows:

A003628

A003628

THE DOMINION OF CANADA

Pay

To the

T W O

Dollars.

T W O

Dollars.

Calixa,

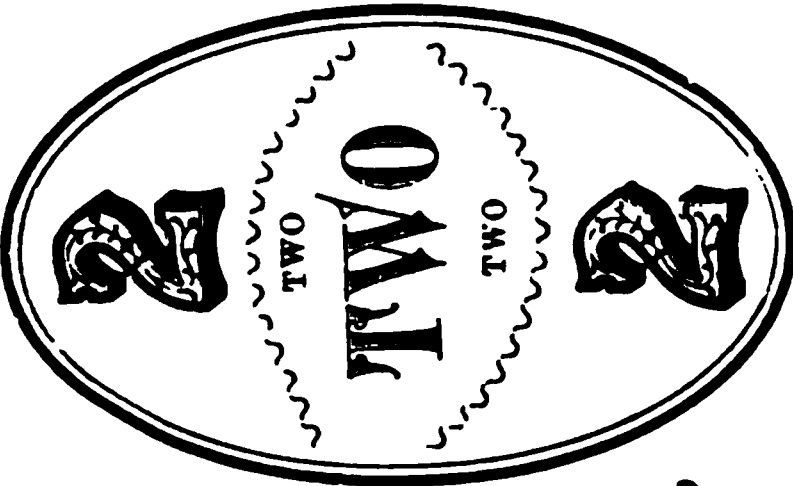
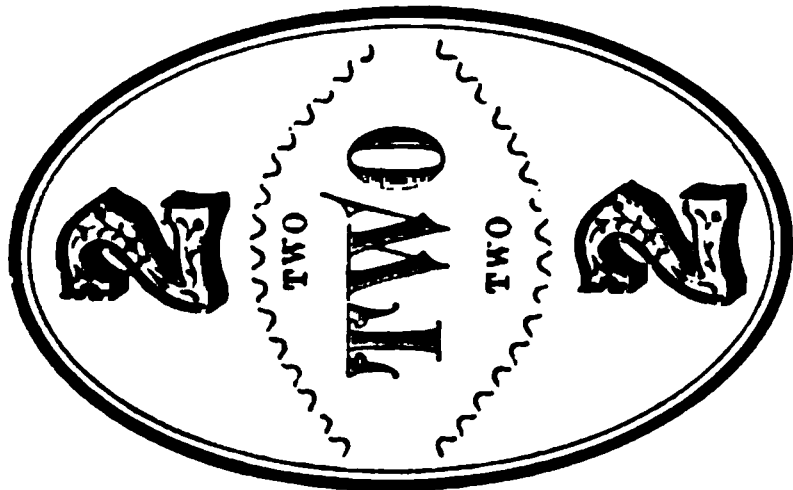
June 1st, 1878

LEWIS PARKER,

T. D. HARRINGTON,

For the Minister of Finance.

For the Receiver General.



The note, as altered, had a cypher after the 2 at the four corners, thus (20), and the O in the word two in the margin had a piece of paper cut from the corner of a genuine note pasted over it; so that it appeared thus (Tw). The note was not altered in any other respect.

The prisoner Bail was not, but LeBlanc was, defended by counsel, his counsel, however, raising no objection as to the sufficiency of the evidence to establish the crime charged, and LeBlanc was acquitted on the merits, while Bail was convicted.

The evidence clearly showed the alteration of the note was made by the prisoner Bail for the purpose of disposing of it as a note for twenty dollars, and that he caused it to be disposed of in his, the prisoner's, presence by LeBlanc in the purchase of two theatre tickets at a cost of thirty cents, the said LeBlanc receiving from the ticket seller in charge nineteen dollars and seventy cents. There was therefore no doubt of the criminal intent of the prisoner; but in the absence of counsel for the prisoner it appeared to the learned Chief Justice that the alteration was not a material part of the note, and that the undertaking of the Dominion of Canada remained unaffected thereby. The learned Chief Justice therefore announced to the counsel for the Crown and the prisoner that he would reserve for the opinion of this Division the question whether, upon the facts above stated, the prisoner Bail could legally be convicted of the statutory felony of altering the said note; and after the finding of the said verdict of guilty by the jury he directed that the prisoner Bail should remain in custody, and postponed the giving of judgment upon the said conviction until the next sittings of the Court at Ottawa.

The question for the opinion of the Justices of this Division was, whether the said Bail was guilty of the said felony and properly convicted thereof on the facts and circumstances above stated; that is, was the alteration of the said note such an alteration as amounted to the felony charged?

Murphy, for the prisoner, cited *Elsworth's Case*, 2 East's P. C. 986 ; *Saunderson v. Piper*, 5 Bing. N. C. 425 ; *Suffell v. Bank of England*, 7 Q. B. D. 270, and in Appeal, 9 Q. B. D. 555 ; *Gurrard v. Lewis*, 10 Q. B. D. 30.

J. G. Scott, Q. C., contra, cited 32 and 33 Vic. ch. 19, secs. 10, 15, 19, D.; 29 and 30 Vic. ch. 10, D.; 31 Vic. ch. 46, sec. 8, D.; *Suffell v. Bank of England*, 7 Q. B. D. 270 ; *Reg. v. Keith*, *Dearsley's C. C.* 486 ; 4 Bl. Com. 247 ; East's P. C. 855 ; *Rex v. Elliott*, 1 Leach, C. C. 175 ; *Rex v. Treble*, 2 Leach C. C. 1040.

Murphy, in reply, referred to *Rex v. Burke*, R. & R. 496 ; 32-33 Vic. ch. 19, secs. 10, 19.

January 6, 1885. WILSON, C. J.—Sir James F. Stephen, now Mr. Justice Stephen, in the third edition of his Digest of the Criminal Law, p. 285, defines forgery as the “making a false document with intent to defraud.” See also Article 356 of that work.

That is in effect the definition of the best writers. The making of a false document includes the alteration of it, for the alteration of a genuine instrument makes it a false instrument.

It is not denied that this Dominion note, so far as it is popularly called a Dominion note, that is, the paper on which the obligatory part of the Dominion is contained, has been altered ; but it is said that in law the alteration made upon the paper commonly called a Dominion note is not an alteration of the note, for the body or obligatory part of the note has not been altered, but the mere surroundings of it, or ornamental or illustrative or explanatory part of it, which are said to be no part in law of the note, have alone been altered.

In East's P. C. 855, it is said: “ Making a fraudulent insertion, alteration or erasure in any material part of a true instrument, although but in a letter,” is a forgery, referring to 1 Hawk. ch. 70, secs. 2, 4, 5 ; 1 Hale's P. C. 683, 4, 5 *Dawson's Case*, 1 Str. 18.

In *Saunderson v. Piper*, 5 B. N. C. 425, the action was

by indorsees against acceptor on a bill of exchange drawn in figures in the corner for £245, while the body was in words for *two hundred pounds*, and it was held the words in the body of the bill were to be regarded, and not the words in the corner; and that as the difference between the figures and the words created an ambiguity, and that ambiguity was patent on the face of the bill, it could not be explained by parol testimony.

The fact that the figures created an ambiguity shows the figures are not without some force.

Coltman, J., the dissenting Judge, thought the parol evidence was admissible to show the larger sum was intended to govern, and as the stamp was sufficient to cover that sum, according to the maxim, *fortius contra proferentem*, and he said, "The oversight of the acceptor has tended to mislead the holder. If it was done with a fraudulent intention there can be no doubt that the plaintiff would be entitled to the whole. There is no fraud here. But, upon the whole, I think this should be taken to be a bill for £245."

This case, properly interpreted, shows the making of the marginal figures "with a fraudulent intention" will be binding on the party making them. If so, it follows the alteration of these figures to a greater sum than the original figures, if done with a fraudulent intention, would be a forgery.

Rex v. Elliott, 2 East's P. C. 951, shews that a note drawn in the body for "fifty," omitting "pounds," should be read as a note for fifty pounds by aid of the figures on the margin, which were "£50."

In some of the older authorities, mentioned in *Saunderson v. Piper*, it is said the figures at the top of the bill served only as a breviat or index to the words in the body of the bill.

The case of *Rex v. Keith*, Dearsley's C. C. 486, S. C. 1 Jur. N. S. 454, is a very important one here.

The prisoner had cut out the centre part, on which the whole of the promissory note was written, and taken the

ornamental border to a printer, representing that he wanted to have a plate made of the border, intending to fill up the centre with the title of some oil or cosmetic, of which the firm, in whose employ he represented himself to be, were vendors. The engraver made a plate, which was delivered to the prisoner, and he was apprehended with it in his possession. The plate had on it merely the Royal Arms of Scotland and the Britannia, although placed as they are in a complete promissory note of the banking company, satisfied the words of the statute. The question turned upon the words, "purporting to be the bill or note, or part of the bill or note, &c.," in the 11 Geo. IV. and 1 Wm. IV., ch. 66, sec. 18.

Pollock, C. B., said: "The defendant procured to be engraved the arms of Scotland and the Britannia, both of which are found upon it, a real note of the British Linen Banking Company. I think the word 'note' means not merely the obligation or writing, but any part of the paper, which is issued as a note. Then, does this purport to be part of such note? The engraving must be capable of being used, and such as on comparison with a real note purports to be a part. Comparing this engraving with a real note, it is quite clear it does purport to be a part of it. This was, however, for the jury to decide, and they have decided it does purport to be part of the note. * *

It seems to me this is a part of a note, using the term 'note' in its popular sense, and that any person looking at a genuine note and then at this production with the two figures, the arms of Scotland and the Britannia, would say the latter purports to be a part of the former."

The other Judges speak in like manner.

In *Suffell v. The Bank of England*, 9 Q. B. D. 555, some notes of the bank, before the plaintiff, a *bond fide* holder for value, got them, had been altered by erasing the numbers upon them and substituting others, with the object of preventing the notes being traced, as payment had been stopped and a notice had issued specifying their numbers.

The real numbers which had been on the notes were 50,501 consecutively to 50,550, and in like manner 56,201 to 56,250, and the alteration was by changing the 5 to a 3.

The argument for the respondent was, that the alteration of the notes must be a material alteration, and must be one which would affect the contract, or if there be no contract, it must affect the rights of some person. The Master of the Rolls said, at p. 562 : " It does not appear to me to be necessary for us now to decide whether the cases have been rightly decided which limit the materiality in the case of an ordinary commercial contract to the subject which affects the contract itself. Whenever it becomes necessary so to decide, it will become necessary also to consider whether in the case of such contract there is anything that can by any rational person be treated as material which does not affect the contract. An illustration will point to what I mean. In an ordinary case it may be said the number put on a bill of exchange or on a cheque will not affect the contract and may not be a material alteration ; but take the case of a debenture issued by a company or a bond issued by a turnpike trust, or a foreign government, and that the bond is paid according to the numbers drawn by lot, which is a very common mode of payment, there, although the number would not affect the contract or the face of the instrument, it really would affect the contract in another way, and I should think there would be no doubt in the world that in such a case an alteration in the number would be a material alteration in the instrument. It therefore appears to me, before one can consider the question as to whether the alteration is an alteration affecting the contract, one must know exactly what the instrument is, what the alteration is, and what the general effect is ; and it may well be in the majority of these cases, although they may not be all rightly decided, for some of them conflict with others, they may well be decided, and yet they may not enable one to decide such a case as this where other considerations arise besides the mere question of contract between the parties."

He refers, then, to the special character of Bank of England notes, and he continues: "Therefore, knowing the use made of the number, the mode in which it is regarded by the public, and in which it is utilized by the banks, no one could say the number was not a material part of the note." Further on, after citing the language of Coleridge, C. J., in the Court below, that "it has always been held that the alteration which vitiates an instrument must be a material alteration, *i. e.*, must be one which alters, or attempts to alter, the character of the instrument itself, and which affects or may affect the contract which the instrument contains, or is evidence of," the Master of the Rolls proceeds: "I am by no means satisfied that what is so stated is incorrect as regards an ordinary commercial instrument which contains nothing but a contract. As I said before, it is difficult to see how in such a case an alteration would be material if the alteration did not affect the contract. * * It seems to me, therefore, on the whole, there is no authority binding upon us to limit the materiality of an alteration so as to exclude this case from the general law, and that there are very strong, and, to my mind, unanswerable reasons for holding this case to be within the general law * * and we are bound to hold, as we do, that the defendants should succeed in their appeal."

The bank note in that case is spoken of by all the Judges in appeal as something more than "an instrument containing a contract, or what is evidence of a contract only; it is a thing which is in itself valued as money and as currency.

Brett, L. J., at p. 568, said: "Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument, or any part of it, is used."

The case of *Garrard v. Lewis*, 10 Q. B. D. 30, was also referred to. There the defendant signed an acceptance, the amount in the body of which was then left

in blank, but in the margin of which were the figures £14 0s. 6d., that being the sum for which the defendant was to accept. He handed the acceptance to the drawer, who filled in the blank in the body of the bill for £164 0s. 4d., and fraudulently altered the figures in the margin to that sum. The drawer then endorsed the bill to the plaintiff, who was a *bond fide* holder for the larger amount, and it was held to be a valid bill, binding the acceptor for the sum mentioned in the body, as the acceptor had entrusted the drawer to fill in the blank, and the plaintiff was a *bond fide* holder for value, and without notice, and that the alteration of the figures in the margin did not affect the bill, because, if the original sum in the margin had not been altered, the amount in the body of the bill could have been recovered by the plaintiff, and it followed he could equally recover the amount in the body of the bill, notwithstanding the alteration of the margin, as he did not know of that alteration.

That may be a perfectly good decision consistently with the decision in *Suffell v. The Bank of England*, for there is said to be a difference between an ordinary commercial instrument containing only a contract, and bank notes which are something more than mere contracts, being part of the currency, or used as part of the currency of the country.

The 29 & 30 Vict. ch. 10, of our Legislature, enacts that the Governor-in-Council may authorize the issue of Provincial notes of such denominational value, and in such form, and signed by such person, and in such manner, by lithograph printing or otherwise, as he may from time to time direct, not exceeding five millions of dollars, excepting as provided for by the 10th section of the Act, which notes shall be redeemable in specie on presentation at offices to be established at Montreal and Toronto, and at that one place at which they shall be made payable, and that they shall be a legal tender except at the offices aforesaid.

Under that Act the chartered banks of the Province may

surrender their right to issue notes, for which they shall receive a compensation as provided in the Act from the Government.

The 31 Vict. ch. 46, is in effect for the Dominion similar to 29-30 Vict. ch. 10, passed before Confederation. There are very stringent provisions in section 14 of the Act of 1868 against engraving or making upon any plate, &c., any note purporting to be a Provincial note or note of the Dominion, without the authority of the Finance Minister, and other provisions of the like kind, which shew that every part of the note is considered to be material. Then the 32-33 Vict. ch. 19, sec. 10, enacts that whoever forges or alters, &c., * * any Dominion or Provincial note * * is guilty of felony.

Section 15 applies to bank notes, &c., and section 19 applies to engraving or making any plate, &c., in similar terms to section 14 of the Act of 1868.

Upon a consideration of the cases and legislation referred to, it is quite clear the Dominion notes, of which the note now in question is one, are something more than ordinary commercial instruments or contracts. Such notes are part of the currency of the country, and they are constituted a legal tender. They are, too, in their original form in such form as has been directed by the Governor General under the authority of the statute, and every part of that form is material. The word *note* in the Act is not confined to the obligatory part of it, but to the whole printed, written, or readable part of the instrument as it was originally issued, and which is commonly called a note.

The alteration of the note, by making the original figure 2 in the corner of the note into 20, was made, and could only have been made to deceive and defraud, and it did so. And it is an alteration of all others the most likely to defraud. If the alteration had been made by changing the *Two* in the body of the note into *Twenty*, leaving the original corner figures untouched, it would not probably, in one case out of a hundred, have defrauded any one, while the alteration of the corner figures, or other large

figures, which are sometimes placed in the centre of the note, denoting the amount of it, would be likely to deceive any one.

Who ever reads the body or obligatory part of the note? The only part of it which is ever looked at is that part of it in which the value of the note is expressed in figures, which are placed there readily to catch the eye. Bank notes, without these large figures of their value, are not known. I doubt if they would be taken. They are placed upon the note to tell the public in the shortest time possible the amount and value of the note, and to meet the hurry and convenience of the public and necessities of business, "Here is a \$2, \$5, or \$10 note," as the case may be; and nothing can better express that declaration than the figures themselves, and so they are universally understood.

None of us entertain the least doubt that the alteration made of the note in question was and is a forgery of that note, and we answer the question submitted to us by saying, we are of opinion the said Eugene Bail was and is guilty of the felony charged against him, and was properly convicted for the same on the facts and circumstances stated; that is, that the alteration of the note was such an alteration as amounted to the felony charged.

ARMOUR and O'CONNOR, JJ., concurred.

Conviction affirmed.

[CHANCERY DIVISION.]

STOBART V. GUARDHOUSE.

Will—Devise—Child—Life estate—Estate in fee.

T. S. after providing for his widow in his will, made the following devise :
 “ And I give and devise to my nephew R. S., lot No. 30 in the 2nd con., said township of Etobicoke, during the term of his natural life, (excepting he have a child or children) if not at the expiration of his life to go to my daughter Ann Guardhouse or her heirs, &c., * *.” The will also contained a residuary devise in favour of the testator’s widow. R. S., took possession, married, had children and died leaving his widow and several children.

In an action by the widow of T. S., claiming that R. S. was only entitled to a life estate in the lot and that she was entitled to it in fee under the residuary clause. It was

Held, following *Lethieullieur v. Tracy*, 3 Atk. 796, that an estate in fee might by implication be vested in the child or that the testator’s intention might be properly effectuated by applying the rule in *Bisfield’s case*, (acted upon in *Doe d. Jones v. Davies*, 4 B. & Ad. 55), and reading “child or children” as *nomen collectivum*, and so creating an estate tail in R. S. Under the circumstances in this case “child” was not a *designatio personæ*, but comprehended a class and therefore the plaintiff must fail.

THIS was an action brought by Mary Stobart against James Guardhouse, James Killam, John Dixon, William Peacock, Mary Stobart, and Mary Jane Stobart, and four other infants, for the construction of the will of one Thomas Stobart, deceased.

The plaintiff was the widow and executrix of the said Thomas Stobart, the defendant James Guardhouse was her co-executor, the defendants Killam, Dixon, and Peacock were the executors, and the defendant Mary Stobart was the widow, and the defendant Mary Jane Stobart and the other infants were the children of another co-executor and devisee named Robert Stobart, who was also deceased.

The plaintiff’s statement of claim set out the whole will which was dated February 4th, 1862, and which after providing for the plaintiff contained the following bequest :
 “ And I give and devise to my nephew, Robert Stobart, lot No. 30, in the 2nd concession said township of Etobicoke, during the term of his natural life (excepting he have a child or children) if not, at the expiration of his life to go to my daughter Ann Guardhouse, or her heirs, &c. * *”

The will also contained the following residuary clause: "And I will and bequeath all other property that I may die possessed of, both the real and personal, not herein or otherwise bequeathed after paying my just debts and funeral expenses and legacies, to my wife Mary Stobbart."

That the testator's nephew, Robert Stobbart, entered into possession of the lot after the testator's death, and continued in occupation thereof until his own death: that he died on or about January 7th, 1884, having first made his will dated November 7th, 1883, executed in manner and form sufficient to pass real estate: that by his said will he appointed the defendants Killam, Dixon, and Peacock, the trustees and executors thereof, and gave them power to mortgage his real estate for the payment of his debts, and after charging his real estate with the payment of his debts devised the residue thereof after the death of his wife, the defendant Mary Stobbart, to the said infant defendants: that his said will was duly proved by the executors therein named: that the said Robert Stobbart was survived by his widow and the infant defendants who were in possession of said lot thirty: and the plaintiff submitted that the said Robert Stobbart was, under the said will of said Thomas Stobbart, entitled to a life estate only in said lot, and that as residuary devisee she was entitled to an estate therein in fee; and asked to have the will construed, and for possession of said lot.

The defendants the executors and Mary Stobbart joined in their statement of defence which set out the date of the death of Thomas Stobbart, and the taking of possession then by Robert Stobbart, and that he retained the same until his death, and since that event that his widow Mary Stobbart and the infant defendants had been in quiet and peaceable possession of the said lot: that shortly after the death of the said Thomas Stobbart the said Robert Stobbart married the defendant Mary Stobbart, and children of the said marriage were born, and some of the said children were over ten years of age: that upon the birth of a child of the said Robert Stobbart, the said lot became vested in

him in fee; and that according to the true intent and meaning of the said will, the said Robert Stobart took an estate in fee simple in the said lands: that at the date of the said will the said Robert Stobart was a widower, but had no children, but he was about to marry again, which fact was well known to the said Thomas Stobart. The Statute of Limitations was also set up.

The infants' statement of defence set up the possession of Thomas Stobart, and of his widow and themselves after his death, the birth of the children and the Statute of Limitations, and claimed that on the birth of a child the lot became vested in Thomas Stobart in fee, and that according to the true intent and meaning of the will he took an estate in fee simple.

The action was tried at the sittings at Toronto on the 25th day of November, 1884, before Boyd, C.

W. M. Clarke, for the plaintiff. If the estate to Robert Stobart was to determine on the birth of a child, that would be a void condition as contrary to public policy. Therefore he took a life estate and no more, and the plaintiff is entitled under the residuary clause in the will. If under the circumstances in this case the Court were to hold that he took an estate in fee, it would be an extreme exercise of its jurisdiction, and would be more in the nature of constructing a will than construing the one in dispute.

McMichael, Q. C., for the defendant Mary Stobart. There was a fee by implication if Robert Stobart had a child.

J. Hoskin, Q. C., for the infant defendants, took the same line of argument as Mr. McMichael, Q. C.

A. Hoskin, Q. C., for the other adult defendants. Upon the birth of a child Robert Stobart's estate in the lot if not a fee simple determined, and thus he and his heirs are now entitled by possession. He referred to *Jarman on Wills*, vol. 2, 4th ed., p. 285; *In Re Harrison's Estate*, L. R. 5 Ch. 408; *Andrew v. Andrew*, 1 Ch. D. 410; *Peat v. Powell*, Amb. 387; *Cropton v. Davies*, L. R. 4 C. P. 159. [BOYD,

C.—I incline to the view that the fee in the property was in Robert Stobbart, and that the plaintiff has no rights. Costs are not pressed for except on behalf of the infants. I will look at the cases.]

December 17, 1884. BOYD, C.—The material clause, in this will, (the construction of which is sought in this action) may be thus read: "I devise to my nephew Robert Stobbart, lot 30, in the 2nd concession of Etobicoke, during the term of his natural life, and if he have no child or children at the expiration of his life, to go to my daughter Ann Guardhouse, or her heirs."

There is thus limited a life estate to the nephew, with a gift over of the fee in case he have no child or children. There was a child born to him who has survived him, and is now one of the defendants. The will was made in 1882, and is not affected by the late Wills Act in the Revised Statutes. According to the view of Lord Hardwicke in *Lethieullieur v. Tracy*, 3 Atk. 796, an estate in fee by implication may be vested in this child. Such a construction will give effect to what I gather was the intention of the testator. He does not appear to have contemplated that this property should go to his widow under the residuary clause as undisposed of. He has in the earlier part of the will provided for her comfortable residence upon this lot which was the homestead during her life, and beyond that he does not intend to benefit her. The Court will, in such cases, lay hold of slight circumstances to give property by implication to the child: *Kinsella v. Caffrey*, 11 Ir. Ch. 154, 162; *Ex p. Rogers*. 2 Madd, 449; *Egan v. Morris*, L. & G. temp Plunket 297.

Against such a conclusion is the language of Wigram, V. C., in *Moneypenny v. Dering*, 7 Hare 588, where, however, no context in the will aided a different construction. But the intention of the testator may also be properly effectuated by applying the rule in *Bifield's Case*, acted upon in *Doe d. Jones v. Davies*, 4 B. & Ad. 55, and reading "child or children" as *nomen collectivum*, and so creating

in the nephew an estate tail. The nephew was about to be married at the time the will was drawn as the testator knew, and the child was born a year after the death of the testator; in such circumstances "child" was not a *designatio personæ*, but comprehended a class. Upon this view of the case I refer also to *Raggett v. Beaty*, 5 Bing. 243, and *Bacon v. Cosby*, 4 De G. & Sm. 261. In either view the plaintiff fails, and the judgment I pronounced at the hearing as now modified may now be entered according to the directions then given and agreed to as to costs.

G. A. B.

[CHANCERY DIVISION.]

McCARTER ET AL., v. McCARTER ET AL.

*Liability of executors for estate moneys received by Solicitor—Inactive trustee
—Negligence.*

A., B. and C. the three executors under a will, sold certain real estate of the testator. C., who was entitled to the annual income of the proceeds thereof, took the most active part in the management of the estate, as the others lived at a distance, and employed a solicitor who received two sums \$980 and \$1580, part of the proceeds of said sale, the former in January, 1876, and the latter in February, 1882. Both the other executors were aware of his employment and that these sums were in his hands. In February, 1884, the solicitor absconded causing a loss to the estate of \$1960, the balance then in his hands. In the will there was a clause "that each (of the executors) should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default.

Held, that all three were equally liable and must make good the amount to the estate, the rule being when one or more of several trustees act in getting in and dealing with the trust funds, an inactive trustee is accountable therefor equally with the others, if, having the means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on.

THIS was an appeal from the report of the Master at Hamilton.

The action was originally brought by the infant children of one Arthur McCarter against George McCarter, Thomas

Watson, and Mary McCarter, the executors and executrix of their father's will, for an account of the estate.

In the taking of the accounts in the Master's office, the Master by his report, dated October 7th, 1884, found as follows :

"The said real estate was sold by the defendants on or about the 30th day of December, 1874, for the sum of \$4,000 ; they received on account the sum of \$1,000 and mortgages for the balance of \$3,000 ; on or about the 1st day of January, A.D., 1875, the said George McCarter borrowed the sum of \$980 out of the sum of \$1000 secured by a mortgage to the defendants, with interest at six per cent. per annum ; on or about the 27th day of January, 1876, the further sum of \$1,580 was paid on account of the said mortgages for \$3,000. and was received by D. B. Chisholm, a solicitor, of the city of Hamilton, who had acted as solicitor for the defendants, and on or about the 7th day of November, 1881, the said George McCarter paid the said David B. Chisholm the sum of \$980 and interest.

The said principal sum of \$4,000 is therefore accounted for as follows :

The balance due and owing upon one of the original mortgages received at the time of the sale of the said real estate.....	\$1420 00
The said sum of	980 00
And the said sum of	1580 00
received by the said Daniel B. Chisholm and left in his hands upon the receipts dated respectively 27th January, 1876, and 6th February, 1882;	
An account of	20 00
which has been allowed the said D. B. Chisholm for solicitor's fees.	
Total	\$4000 00

On the 10th of February, 1876, the sum of \$600 was lent by the said D. B. Chisholm, and is secured by a mortgage made by Andrew Kernighan to the said defendants leaving a balance of \$1960 of principal money unaccounted for, and which is lost to the estate of the said testator. *

* The reason of such sum being lost was, that D. B. Chisholm had absconded without paying it over or accounting for it.

The interest * * *

The defendants are liable to account for the said sum of \$1960, and to pay and make good the said sum to the estate of the said testator with interest from the said 6th day of February, 1884."

From this report the defendant George McCarter appealed, on the grounds that the Master had found that the real estate was sold by all the defendants, and that D. B. Chisholm was the solicitor of all the defendants for the receipt of the purchase money, whereas the fact was that the said sale was negotiated by, and the said Chisholm was the solicitor of the defendants Mary McCarter or Thomas Watson, or one of them, and not in any way under the control of the said George McCarter; that the Master found that the said George McCarter had paid the \$980 to Chisholm, when the fact was he had paid it to Mary McCarter, to whom he was bound to pay it in order to get a discharge of his mortgage, which she executed on the same day; that the Master should have found that Mary McCarter or Thomas Watson were, or one of them was liable for said sum of \$1960, as no part of said moneys ever came to said George McCarter's hands; that the Master should have certified that the said George McCarter urged his co-defendants to lend the sum of \$1580 to one Craddock, but that they refused, and left it in the hands of said Chisholm for investment.

The defendant Watson also appealed from the Master's report, because the Master had found that he was liable for all moneys lost to the estate, when under the will of the testator he is only liable for his own wilful neglect and default, and the loss did not arise through any wilful neglect or default of his; that he lived a considerable distance from Hamilton, where Mary McCarter lived, who undertook the management of the estate, and the said sum of \$1580 was entrusted in the ordinary course of business to said Chisholm, who was a solicitor in good standing, for investment.

The appeals, together with the hearing on further

directions, were argued on the 12th November, 1884, before Boyd, C.

G. H. Watson, for the defendant Watson. The evidence of nearly all the witnesses distinctly shows that Mary McCarter undertook the control and management of the estate moneys, and my client should not be made liable for her acts. In any event what was done was in the usual course of business, and the solicitor was trusted in the same manner as the testator would have trusted him if he had been living. The evidence also shows that the solicitor was in good standing and there was no negligence in that respect. The will also provides that "each (of the defendants) shall be responsible for his or her own acts only, and irresponsible for any loss unless through wilful neglect or default": *King v. Hilton*, 29 Gr. 382; *Re Bird*, *Oriental Commercial Bank v. Savon*, L. R. 16 Eq. 203; *Re Godfrey*, *Godfrey v. Faulkner*, 23 Ch. D. 483; *Re Speight*, *Speight v. Gaunt*, 22 Ch. D. 727; 9 App. Cas. 1. If the Court is against my client on the general liability, he should be indemnified by Mary McCarter, as to her one third, and the interest to which she is entitled under the will should be retained from her to pay that one third, for she may not be worth her one third now.

Teetzel, for the defendant Mary McCarter. My client has no other means than the income from the estate. All the executors are equally liable for the loss, and if she does not pay her share now the other executors should be indemnified if possible.

Ermatinger, for the defendant George McCarter. The evidence shews that the other two executors undertook the management of the estate, and my client was not allowed to interfere. At first he objected to prove the will and only consented when he was assured that he was only responsible for his own acts. The accounts put in shew that he had nothing to do with the management of the estate. His mortgage for \$980, was to the other two executors and the receipts endorsed are by Mary McArthur.

George McArthur brought in a borrower and the other two refused the loan. He was never asked to do anything except when it was necessary for the sake of conformity : *Davis v. Spurling*, 1 Russ & M. 66 ; *Wilkins v. Hogg*, 3 Gif. 166 ; *Re Speight, Speight v. Gaunt*, 22 Ch. D. 727 ; *Williams on Executors*, 7th ed., 1832-36. *Godfrois Digest of the law of Trustees*, at p. 18, lays it down : " It follows that as executors in trust are each entitled to receive assets, the one who does not is liable only for the misapplication if he knew of the fraud and acquiesced in it." *Stern v. Mills*, 4 B. & Ad. 657 ; *Job v. Job*, 6 Ch. D. 562. [BOYD, C., but that law does not apply here, because executors are paid their commission.]

Watson, in reply. George McCarter participated in everything that Watson did. One knew as much as the other, and McCarter knew where the money was, because when he came in to sign the release he brought in a borrower to get the money.

Laidlaw for the plaintiffs. It is not possible to draw any distinction between the liability of the defendants. The Master has found them all liable and his finding should be upheld : *Fisken v. Brooke*, 4 A. R. 8. (BOYD, C., " Is that case law any longer since the Judicature Act under the English decisions.) The trustees should be removed and there should be a reference to appoint new trustees. The fund is so small that the appointment of new trustees would be better than paying the money into Court. The costs, except those of the appointment of new trustees, should be paid by the defendants : *Burritt v. Burritt*, 17 Gr. 143 ; *Bostock v. Floyer*, L. R. 1 Eq. 26 ; *Sutton v. Wilders*, L. R. 12 Eq. 373 ; *Hopgood v. Parkin*, L. R. 11 Eq. 77.

Ermatinger, in reply. The evidence shews that Mary McCarter received the mortgage money paid by George McCarter, and that she would not take it without notice until she was advised that she was obliged to do so by the terms of the mortgage.

November 19th, 1884. BOYD, C.—Geo. McCarter knew of the two sums now in question, being under the control of the executors for investment, *i. e.*, \$980 and \$1580. He himself had paid the \$980 to the solicitors, one of whom afterwards made away with both sums: and he knew or should have known that the \$1580 was in the hands of the solicitor to be invested when he brought down Craddock as a borrower. After being disappointed in getting the loan for his friend he took no further concern, it would seem, in the moneys of the estate, made no enquiries as to their safe keeping or their investment, and seemed to think if he did nothing he would be safe.

By the terms of the will each trustee is to be responsible for his own acts only, and “irresponsible for any loss unless through wilful neglect or default.”

This executor knows that \$1580 is in the hands of his co-executors, and he should have known that it was left by them with the solicitor for investment in January, 1876. He knows that a further sum of \$980 which he borrowed was left with the solicitor to be re-invested in February, 1882. The loss arises from the non-investment by the solicitor, who absconds in February, 1884. He knew the terms of the will and that the money was to be kept invested, and he makes no enquiries and takes not the slightest pains to inform himself of what is being done with the fund. The \$1580 is money invested with Blanchard which comes to the hands of the co-executor and the solicitor by the assistance of this executor who signed the discharge of the mortgage to Blanchard.

The law applicable to this state of facts was somewhat considered by me when Master, in *The City Bank v. Maulson*, 3 Ch. Ch. 334, and the conclusions there stated appear to be corroborated by later decisions. The rule is that if one or more of several trustees act in getting in and dealing with the trust funds the inactive trustee is accountable therefor equally with the others, if having the means

of knowledge by the exercise of ordinary vigilance he stands by and permits a breach of trust to go on.

Here McCarter knew the moneys were in the hands or under the control of his co-trustees to be invested, and he allows them so to remain, in one case for eight years and in the other for ten years, without any inquiry or any assurance that the trust was being properly administered. This was wilful neglect and default which he would not have been guilty of in the management of his own affairs. This element differs the present case from *King v. Hilton*, 29 Gr. 381, where the Judge came to the conclusion that no blame attached to the executor who was merely passive by not obstructing his co-executor from getting the assets into his possession. *Burrows v. Walls*, 5 DeG. M. & G. 249, cited in 29 Gr. is adverse to this appeal, where the Lord Chancellor says two of the three executors and trustees "received some portion of the properties, and they were all guilty of a breach of trust, in not taking care that the trust of the residue was satisfied by the investment of the property in proper securities." In *Rodbard v. Cooke*, 25 W. R. 556, Fry, J., says: "Where there are two trustees, and one of them places a fund so that it is under the sole control of the other, if the money is misapplied by that other, both are equally liable. * * * The object of having two trustees is, to double the control over the trust properties, and when one trustee thinks fit to give the other the sole power of dealing with the trust property he defeats that object, and he therefore becomes himself responsible." See also *Cowell v. Gatcombe*, 27 Beav. 568.

I affirm the Master's report, with costs of appeal; and as the action was also heard on further directions it will be ordered that the executors pay the amount found due against them, and then McCarter and Watson, if they pay all, will have contribution from the share payable to the widow under the will. But the better plan in the interests of the plaintiff would be to require only two-thirds from these two executors, as was offered at the beginning of the enquiry

in the Master's office. The trustees should be removed and others appointed, with reference to the Master for that purpose. It is a case for giving the infants their costs of suit against the defendants.

G. A. B.

[CHANCERY DIVISION.]

LABATT V. CAMPBELL.

Will—Devises to Charities—Mortmain—Failure of bequests—Incorporated Synods—Power to hold in Mortmain.

R. P. L., by his will directed his executors "by and out of the moneys which shall be received by them from the P. B. & M. Co., for or on account of the debt or sum of \$35,000 owing and secured by mortgage by that Company to me at the time of my decease, and of the interest thereof which shall accrue after my decease, in the first place to pay the sum of \$1,500, part thereof to the Bishop for the time being of Algoma in Canada, to be invested by him in or upon any of the investments hereinafter authorized with power for the Bishop of Algoma aforesaid for the time being, from time to time to vary and transpose the investments thereof at his discretion for any other or others of the kind prescribed and the income of such investments to be applied in and for the education and qualifying of John Eskinah an Algoma Indian, at present of the Shingwauk Home, Sault Saint Marie, Algoma, aforesaid, (heretofore supported by me) as and for a Missionary in the Diocese of Algoma aforesaid, for and during, and until such time as the Bishop of the said Diocese for the time being shall consider sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying to apply such income as aforesaid forever thereafter from time to time in and for the education and qualifying of some other person to be nominated by such Bishop for the time being for a like purpose, and during such time as he shall think proper; but for which applications the Trustees and Executors shall not be responsible. And after payment of the aforesaid legacy I give and bequeath the following legacies to be paid out of the same fund or moneys, namely:

- "To the Treasurer for the time being of the Algoma Missions in British America the sum of \$1,500 of Canadian Currency for the benefit of those Missions.
- "To the Treasurer for the time being of the Huron Missions in British America, the sum of \$1,500 of the aforesaid Currency for the benefit of those Missions.
- "And to the Treasurer for the time being of the Ontario Missions in British America, the sum of \$2,500 of the aforesaid Currency for the benefit of those Missions."

Held, that the bequest to the Bishop of Algoma for the benefit and education of John Eskinah and others was intended to set apart a fund

which was to have perpetual continuance and in which no individual was to have a personal right, and following *Gillam v. Taylor*, L. R. 16, Eq. 584, such bequest was void.

Held, also, that the bequest to the Treasurer for the Algoma Missions was a charitable gift and must fail, because no person or body was empowered to hold it as against the Statute of Mortmain, 9 Geo. 2 ch. 36, inasmuch as there was no incorporation of Algoma for Ecclesiastical or Missionary purposes with such powers.

Held, also, that the bequests to the Treasurers of the Huron and Ontario Missions respectively were intended for the Missions sustained by the Incorporated Synods of the Dioceses of Huron and Ontario, and that by virtue of their Acts of Incorporation both these Dioceses were enabled to hold lands, &c., in Mortmain, and that such bequests therefore did not fail either for uncertainty or because they could not be held by the defendants the Synods respectively.

THIS was an action brought by John Labatt, George Thomas Labatt, and Robert Kell, against Archibald Hamilton Campbell, the Right Reverend Edward Sullivan (Lord Bishop of Algoma), Edmund B. Reed, the Incorporated Synod of the Diocese of Huron, Robert Morton Moore, the Incorporated Synod of the Diocese of Ontario, and Agnes Labatt, to obtain the construction of the will of the late Robert Pritchard Labatt.

The plaintiff's statement of claim set up that they were the executors and trustees of the will of Robert Pritchard Labatt in his lifetime of Upper Norwood, in the county of Surrey, England; that the said R. P. Labatt died about the 12th June, 1877, after making his will dated the 1st March, 1877; that among other bequests in said will were contained those in the words and figures following:

"I give, devise, and bequeath all my real and personal estate and effects, whatsoever and wheresoever, to my brothers John Labatt and George Thomas Labatt, and Robert Kell, of Bradford, in the county of York, Esquire, upon trust, to sell and convert into money such part thereof as shall not consist of money, and to collect and get in such part thereof as shall consist of money, and by and out of the moneys which shall be received by them from the Prescott Brewing and Malting Company, in British America, for or on account of the debt or sum of \$35,000, of Canadian currency, owing and secured by mortgage by that company to me, or of so much thereof as shall be owing to me at the time of my decease, and of the interest thereof which shall accrue after my decease. In the first place to

pay the sum of \$1,500, part thereof, to the Bishop for the time being of Algoma, in Canada, to be invested by him in or upon any of the investments hereinafter authorized with power for the Bishop of Algoma, aforesaid, for the time being, from time to time to vary and transpose the investments thereof at his discretion, for any other or others of the kinds prescribed and the income of such investments to be applied in and for the education and qualifying of John Eskinah, an Algoma Indian, at present of the Shingwauk Home, Sault Saint Marie, Algoma, aforesaid, (heretofore supported by me), as, and for a missionary in the Diocese of Algoma, aforesaid, for, and during and until such time as the Bishop of the said Diocese, for the time being, shall consider him sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying, to apply such income as aforesaid, for ever thereafter from time to time, in and for the the education and qualifying of some other person to be nominated by such Bishop, for the time being, for a like purpose, and during such time as he shall think proper; but, for which applications the trustees and executors of this my will. shall not be responsible. And after payment of the aforesaid legacy, I give and bequeath the following legacies to be paid out of the same fund or moneys, namely :

To the Treasurer for the time being, of the Algoma Missions, in British America, the sum of \$1,500, of Canadian currency, for the benefit of those missions.

To the Treasurer, for the time being, of the Huron Missions, in British America, the sum of \$1,500, of the aforesaid currency, for the benefit of those missions.

And to the Treasurer, for the time being, of the Ontario Mission, in British America, the sum of \$2,500, of the aforesaid currency, for the benefit of those missions."

That the mortgage aforesaid was on real estate in the town of Prescott, in the county of Grenville, and province of Ontario: that in and by the said will the testator disposed of his residuary estate in the words and figures following:

"And as to the residue and remainder of my estate and effects, or of the proceeds of such sale, conversion and getting in as aforesaid, I direct my trustees to invest the same in or upon any of the investments of the description

hereinafter authorized, and to pay the income thereof unto my dear wife Agnes during her natural life, for her own sole and separate use and benefit, absolutely free from the debts, control or engagements of any future husband she may marry; and upon the decease of my said wife I direct my trustees to divide and pay all my said residuary estate, the proceeds of which have been paid to my said wife during her life, unto and equally between and amongst the person or persons who at the decease of my said wife would be my next of kin, and entitled to my personal estate under the English statute for the distribution of the personal estate of intestates, if I were to die immediately after the decease of my said wife as tenants in common."

That the defendant the Right Reverend Edward Sullivan was the Bishop of the Diocese of Algoma in Canada, and claimed that he was entitled to recover the \$1,500 bequeathed for the purpose of the education and qualifying of an Algoma Indian as and for a missionary in the Diocese of Algoma: that the defendant A. H. Campbell was the Treasurer of the Diocese of Algoma and claimed that he was entitled to receive the \$1,500 bequeathed to the Treasurer for the time being of the Algoma Missions in British America: that the defendant E. B. Reed was the Treasurer of the Incorporated Synod of the Diocese of Huron, and that the defendants the Synod of the Diocese of Huron were incorporated: that the defendants Reed and the Synod of the Diocese of Huron claimed that the \$1,500 bequeathed to the Treasurer for the time being of the Huron Missions in British America should be paid to the defendant Reed as Treasurer of said Diocese: that the defendant R. M. Moore was the Treasurer of the Mission Fund of the Diocese of Ontario, and that the Synod of the Diocese of Ontario were incorporated: that the defendants Moore and the Synod of the Diocese of Ontario claim that \$2500 bequeathed to the Treasurer for the time being of the Ontario Missions in British America should be paid to the defendant Moore as Treasurer of the Mission Fund of the said Diocese of Ontario: that the defendant Agnes Labatt was the widow of the testator: that the plaintiffs.

wished to carry out the intention of said testator as expressed in said will, but owing to the terms in which said bequests were made there were doubts as to who might be entitled to receive the same, and there were also doubts as to the validity of the said bequests in view of the Statutes of Mortmain: and asked for a direction from the Court in the carrying out of the trusts of the said will.

The defence of the Synod of the Diocese of Ontario and R. M. Moore set up that the devise of the \$2,500 was a valid bequest to R. M. Moore as Treasurer of the Diocese of Ontario and the Mission Fund thereof, for the benefit of the Domestic Missions of the said Diocese, which were at the time of the making of the said will and had since been organized and operated by the said Synod through a committee of their body called the Mission Board: that by virtue of the Acts incorporating said Diocese the said bequest was vested in the said Incorporated Synod in trust for the said fund: and that the effect of the said Acts of Incorporation was to except the Synod from the operation of the Statutes of Mortmain.

The defence of the Synod of the Diocese of Huron and E. B. Reed set up the incorporation of the Synod: that at the time of making the will and prior thereto there were certain special "trust funds" in connection with, and created and administered by said Diocese, one of which was designated "The Mission Fund," and was a trust for the benefit of Domestic Missions of the said Diocese: that the said E. B. Reed was the Treasurer of the said Mission Fund: that the said Mission Fund was the beneficiary intended by the testator in the bequest of \$1,500 to the Treasurer for the time being of the Huron Missions in the said will contained, and that the said bequest was a valid bequest to the defendant Reed as Treasurer of the Diocese and of the said Mission Fund: that the effect of the Acts incorporating the Synod was to exempt the Incorporated Synod from the operation of the Statutes of Mortmain.

The defence of the defendant the Right Reverend Edward Sullivan and Archibald Hamilton Campbell set up that the Right Reverend Edward Sullivan was the Bishop of Algoma, and was entitled to the \$1,500 in the trusts in will set out: that the defendant Campbell was Treasurer of the Algoma Missions in British America, and was entitled to the \$1,500 for the benefit of those missions: and submitted their rights to the protection of the Court.

The case came on for trial at the Brockville Sittings on September 24th, 1884, before Boyd, C., when the evidence was taken, and the argument adjourned to Toronto, which latter took place there on October 31st, 1884.

Lash, Q.C., and J. H. Mayne Campbell, for the Bishop of Algoma and the defendant Campbell. The bequest for the benefit of the Indian, John Eskinah, is for a defined object and for a defined time, and is therefore good. It is true it cannot extend beyond his life, still it may last that long. *Doe d. Phillips v. Aldrich*, 4 T. R. 264; *Thomas v. Howell*, L. R. 18 Eq. 198; *Blandford v. Fackerell*, 4 Bro. C. C. 394. If the money is to be invested and applied for the benefit of a named person, the trustee is entitled to the *corpus* and must carry out the trust. The certainty of the devise is fixed by the evidence. The statute of Mortmain does not of its own effect extend to Canada: *Whicker v. Hume*, 7 H. L. C. 124; *Mayor of Lyons v. East India Co.*, 1 Moore's P. C. C. 175; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Attorney General v. Stewart*, 2 Mer. 148; *Mitford v. Reynolds*, 1 Phil. 185. The devise in this case is a devise of part of the proceeds of a mortgage which is personal property. The law of domicile governs a bequest of personal property: *Thompson v. Advocate General*, 12 Clark & F. 1; *Thornton v. Curling*, 8 Sims, 310; *Price v. Dewhurst*, 4 M. & C. 76. [BOYD, C.—That question was considered in *Parkhurst v. Roy*, 7 A. R. 614.] The devise is good in this case, both here and in England. A mortgage is personal property for the purpose of succession. *Price v. Dewhurst, supra*, settles that.

Walkem, Q.C., for the Synod of the Diocese of Ontario and defendant Moore. It must be conceded that if there was no statute authorizing the devise to the Synod of the Diocese of Ontario, the law laid down in *Whitby v. Liscombe*, 22 Gr. 203, 23 Gr. 1, would apply, and the devise would be void; but the Synod by virtue of its incorporation is entitled to take the bequest. The Church Society of the Diocese of Toronto was incorporated and got power to hold property by virtue of 7 Vic. ch. 68, and the Synod of the Diocese of Ontario was incorporated and took similar powers under 25 Vic. ch. 86. [*Moss*, Q.C., I admit, on behalf of the next of kin, that the Synod of the Diocese of Ontario can hold lands in Mortmain, but I contend that the will does not devise to it.] The devise here is for the encouragement of missions, and is one mentioned in the Act, 7 Vic. c. 28. The devise comes within the terms of the Act, being "to the Treasurer, for the time being, of the Ontario Missions, in British America, &c." The wording of the Act is wide, "to for or in favour of," and such a devise is vested in the corporation. If devises could only be made to the corporation there would be no necessity for the vesting clause. This devise is in favour of the corporation and is thus vested in them: *Church Society v. Crandell*, 8 Gr. 34. All the conditions are fulfilled, the object, the bequest to an officer and the vesting.

Betts, for the Synod of the Diocese of Huron and the defendant Reed. I assume certain points to be decided. [*Boyd*, C.,—I have no doubt who was meant, but there may be a question of sufficiency of the description.] [*Walkem*, Q.C., I would refer your Lordship to *Re Kilvert's Trusts*, 7 Ch. 170.] If the bequest was held to be bad, there would be an intestacy as to that amount, and causing an intestacy is the last resort of the Court. The position of the Diocese of Huron is the same as that of the Diocese of Ontario, and its Church Society is an off-shoot of the old Church Society of the Diocese of Toronto, and is merged now in the Synod of the Diocese of Huron, which has all the powers, &c., previously possessed by the Church Society:

Vic. ch. 65. The bequest is, "to the Treasurer for the time being, of the Huron Missions, in British America," and in favour of the Synod: *Edwards v. Smith*, 25 Gr. 168. The treasurer of the Mission Fund is the treasurer of the Synod, and Mr. Reed fills both positions. *Walker v. Murray*, 5 O. R. 641, decides that Mr. Reed could take. Also *Re Delany's Trusts* there cited. Also *Bernasconi v. Atkinson*, 17 Jur. (2) 128; *General Lying in Hospital v. Wright*, 21 L. J. N. S. Chy. 537; *Phillips v. Barker*, 17 L. J. N. S. Chy. 1146; *Attorney General v. Rye*, 1 Moore 267; *Ryall v. Lannam*, 10 Beav. 536.

Loss, Q.C., for the next of kin of the testator, by order of the Court. The bequest to Mr. Campbell cannot be sustained. The devise shews that he was not to take beneficially, and as there is no Act of Incorporation in the case of Algoma, the same as in the Dioceses of Ontario and Huron, he cannot take the benefit of it for charity. A devise of personalty, savoring of realty is void: *Curtis v. Yuton*, 14 Ves. 537; *Parkhurst v. Roy*, 27 Gr. 361, 7 O. R. 614. It has not been raised in the pleadings or shown by the evidence, that the testator changed his domicile from Canada to England. What is necessary to change domicile is considered in *Magurn v. Magurn*, 3 O. R. 570. As to the bequests to the Ontario and Huron Missions, the clause of their respective acts allows them to take and hold "by their names aforesaid," but goes no farther. It does not allow them to take any bequests given to other societies. The devise "to the Treasurer for the time being, of the Ontario (or Huron) Missions in British America," is indefinite and too uncertain. We don't know anything of the Ontario or Huron Missions in British America, though such might exist. The evidence shows that there are other Dioceses in British America, outside of the Dominion of Canada. There is no treasurer of the Ontario Missions or of the Huron Missions. Even if the devise is taken most favourably as "in favour of the Synod," it would not be enough to cover it: *Ashton v. Wood*, L. R. 6 419.

Lash, Q.C., in reply. The words in the will "now supported by me," used in reference to the Indian, John Eskinah, plainly show that the object so far as that Indian is concerned, is defined and certain, and is good in respect to him even if it fails afterwards. *Curtis v. Hutton*, 14 Ves. 537, and nearly all the cases cited by my learned friend Mr. Moss, were cases of devises of real estate and must be governed by the law of the land where the real estate was situate.

Walkem, Q.C., in reply. Mr. Moore is treasurer of the Synod of the Diocese of Ontario, and as such is treasurer of all the different funds of the Diocese, and is therefore treasurer of the Mission Fund.

Betts, in reply. The treasurer of the Synod of the Diocese of Huron is, treasurer *de facto* and *de jure* of all the funds of the Diocese although perhaps not actually nominated treasurer of the Mission Fund. The corporate name of the Synod is the name in which it holds property, although it may have received it by some other name.

Moss, Q. C., in reply, refers to cases in *Watson's Compendium of Equity*, p. 55.

November 26th, 1884. BOYD, C.—The bequests to the Treasurer for the time being of the Huron Missions in British America of \$1,500 for the benefit of these missions, and a like bequest to the Treasurer for the time being of the Ontario Missions in British America, are questioned on the ground that it is not possible to ascertain the beneficiaries from the vagueness of the descriptions, and that if ascertained, they cannot hold because of the Statutes of Mortmain. I am satisfied on the evidence that the testator, a member of the Church of England, who was born and had long lived in this country, first at London and then at Prescott, intended to benefit the missions sustained by the Incorporated Synod of the Diocese of Huron, and by the Incorporated Synod of the Diocese of Ontario, of which the defendants Reed and Moore are respectively treasurers.

There is a mission fund in connection with each Synod, and to both funds the testator was in 'the habit of contributing. The treasurers of both Dioceses are *ex officio* treasurers of the mission boards, and the moneys received by them are held for the use of the mission work in the Diocesan districts of Huron and Ontario respectively. Upon both corporations are conferred by statute all such powers, rights, franchises, and privileges as are by any statute of the province conferred upon any incorporated Church Society of the United Church of England and Ireland in this province. See 25 Vic. c. 86 s. 1, and 38 Vic. c. 74 s. 7, that relates back to the provisions of 7 Vic. c. 68 s. 1, enabling such bodies to hold in Mortmain all lands, &c., which have been or thereafter shall be devised, &c., in any manner or way whatsoever, to, for, and in favour of the said corporations; and in sec. 2 it provides for vesting all such lands, &c., in the corporations. The bequest of the proceeds of the mortgage in this case to the Treasurer for the time being of the Missions is one in favour of the Diocese. The mission system is a part of the organization of the Diocese, and this bequest, in my judgment, does not fail, either for uncertainty or because it cannot be held by the defendants. By the terms of the statutes it vests in the Incorporated Synods, and is a valid and unobjectionable bequest.

The bequest of the proceeds of the mortgage given to the Treasurer for the time being of the Algoma Missions in British America, for the benefit of these missions, fails however, because it is a charitable gift, and there is no person or body who is empowered to hold as against the Statutes of Mortmain (so called) 9 Geo II. c. 36, inasmuch as there is no incorporation of Algoma for ecclesiastical or missionary purposes as in the case of the other defendants.

The last bequest which is impeached is that of \$1,500 to the Bishop of Algoma for the time being, to be invested and the income applied to complete the education of John Eskinah, the Algoma Indian, as a missionary, and there-

after to apply the income for ever for the education and qualification of some other person for a like purpose. This is clearly intended to set apart a fund which is to have perpetual continuance, in which no individual is to have a personal right, but the income of which is to be administered at the discretion of the Bishop for the time being. This is so even in the case of the first named beneficiary, because he is to enjoy it only till such time as he is sufficiently qualified for his work in the opinion of the Bishop. It falls within the scope of the decision in *Gillam v. Taylor*, L. R. 16 Eq. 584, and is void to all intents.

As to these last bequests it was argued that the testator's domicile was English, and that the mortgage was personalty, and would follow the law of the testator's domicile, and that as from an English point of view the Statute of Mortmain was not in force in the colonies, the bequest would be valid notwithstanding that this province had adopted the English law as to charitable gifts and mortmain. If this consideration does make a difference (as to which I express no opinion,) then that special question of domicile should have been raised as an issue upon the pleadings. The defence of the Bishop of Algoma and Mr. Campbell so far from raising it rather suggests that there may be two domiciles. Sec. 2 states we admit that the plaintiffs are the executors or trustees named in the last will and testament of Robert Labatt, late of the town of Prescott in the county of Grenville in this province, and Upper Norwood in the county of Surrey in England." The statement of claim to which this is responsive states that the plaintiffs were executors of Labatt in his lifetime, of Upper Norwood, in the county of Surrey, in England. There is in truth no point made in the pleadings as to the testator's domicile. In the evidence it appeared that he was born in Canada, and I am not satisfied even upon the present evidence that he ever abandoned or changed this his domicile of birth. But if any of the parties desire to prosecute this point further, a petition may be filed within a month for that purpose, to which the next of kin will make answer, and upon which further evidence may be given in the usual way.

This need not delay the payment to the other charities. If no further step is taken, then the judgment will declare the bequest to the Bishop of Algoma and to Algoma missions invalid and void.

The costs of this litigation should be paid by the estate.

G. A. B.

[QUEEN'S BENCH DIVISION.]

BLEAKELY V. TOWN OF PRESCOTT.

Municipal corporation—Badly constructed sidewalk—Ice on sidewalk—Negligence.

A sidewalk in the town of Prescott was so constructed by the corporation that a portion of it slanted or declined lengthwise from west to east to the extent of eight or nine inches in a few feet. On this incline snow and ice had been allowed to accumulate, and formed a ridge of hard beaten frozen snow for a considerable distance on the sidewalk. The plaintiff, who was walking at the time from west to east, fell upon the incline, and was injured.

Held, that the defendants were liable.

Burns v. City of Toronto, 42 U. C. R. 560, and *Skelton v. Thompson*, 3 O. R. 11, distinguished.

ACTION against the defendants, a corporation, for injury sustained by the plaintiff on the 27th of January, 1884, by reason, as alleged, of the sidewalk on King street in the town of Prescott being out of repair.

The want of repair was alleged to have consisted in allowing snow and ice to accumulate on the sidewalk on King street, the main street of the town, and in leaving on the centre line of the sidewalk a ridge of hard beaten frozen snow for a considerable distance in length on the sidewalk, so that in attempting to cross that way the plaintiff fell and broke her arm, and was otherwise injured.

The trial took place at the last Spring Assizes at Brockville before Patterson, J. A., without a jury.

The plaintiff was walking at the time from west to east, and said she fell at Brown's gateway, just as she had passed

the corner of his house : that the snow had been shovelled from the sidewalk, but there was a hard ridge left running along about the width of the sidewalk : that if the ridge had been hacked with an axe, or if there had been ashes put on the sidewalk, it would have been safer : that she fell on the *slant*.

Elizabeth Campbell, a witness for the plaintiff, said the plaintiff fell on the *slide*, "but," she added, "as far as I noticed, the sidewalk was all right. I found no difficulty about it." She thought the plaintiff fell east of Brown's window.

William Bleakely, a son of the plaintiff, said he saw blood where he says his mother fell, about a couple of feet east of Brown's window, opposite the gateway.

Dr. Hart, in describing the locality, said :

"West of the slide a new block was built late last fall. The town raised the sidewalk in front of the block, and about as far east as Brown's premises, and about a foot higher than the rest of the sidewalk about there. Then the contractor made a slant from the east end of the elevated sidewalk of about from seven to nine feet to meet the level of the old sidewalk. You can slide down it very easily. I have frequently done it myself. I saw blood *on the slide*, none to the east of it. The slide begins just a little east of Brown's door. The incline there is from west to east. Just east of his door-way commences his window. If the plaintiff fell just opposite that window she would have been on the verge of the slide. I call it a slide, because the natives slide down it. I think the woman would not have fallen if there had not been the slide."

For the defence, Mr. Boyd, the Mayor, said : "There is a slight decline at the place mentioned, 15 or 16 feet in length ; it extends in front of a doorway, and a window, and a stone wall."

W. Mowat, the Chief of Police, did not consider the place dangerous. It was in as good a condition in front of the places west of Brown's. He thought the slant or decline

was five or six feet in length, and about eight or nine inches fall in that distance.

James Boulton said he saw the plaintiff for a good way west before she came to the place: that she was going carefully: that she walked as if she had no rubbers on: that he thought she had not got to the slant before she fell: that her feet slipped before she got on the slide: that her head when she fell might have been on the slide, but her feet were not.

H. Robinson said his shop was near Brown's, and west of it: that snow and ice were not allowed to accumulate in front of his place: that the sidewalk began to slope off at Brown's window.

Charles Brown said: "My sidewalk was in as good a condition as it was in front of Robinson's."

Judgment was given for the defendants, and the action was dismissed, with costs, principally on the ground of contributory negligence on the part of the plaintiff, the learned Judge, however, finding that the plaintiff would be entitled to \$200 damages, in case she moved against the judgment and the Court should take a different view of the liability of the defendants.

At the last sittings of this Court *W. Read* obtained an order *nisi* to enter the verdict and judgment for the plaintiff for \$200.

November 24, 1884. *Watson* shewed cause, and *Read* supported the order *nisi*, contending that the existence of the ridge of ice was evidence of negligence, as was the slope; and that the Judge should not have held that the plaintiff's not wearing rubbers was evidence of contributory negligence.

The cases cited are referred to in the judgment.

O'CONNOR, J.—I think the plaintiff ought to recover. Her case is similar to, but, in my opinion, stronger than that of the plaintiff in *Luther v. Worcester*, 97 Mass. 268, referred to by Mr. Read, and in that case the plaintiff was held

clearly entitled to recover. Other American cases are to the same effect. Those decisions are based on the construction of statutes imposing duties on corporations regarding streets and highways, similar to those imposed by our Municipal Acts. I dissent, with great diffidence, from the view as to contributory negligence expressed by the learned Judge who tried the case. The case of *Burns v. The City of Toronto*, 42 U. C. R. 560. is clearly distinguishable from this case; so also is the case *Skelton v. Thompson*, 3 Ont. R. 11; and in that case my brother Armour, in a well reasoned judgment, dissented from the majority of the Court. Here the sidewalk at the place where the accident happened was so badly constructed that it was easily made dangerous, even by a small accumulation of snow and ice, and in fact it was so made dangerous and was in that state when the plaintiff was injured. Such a state of the sidewalk cast greater responsibility on the defendants, and demanded more care on their part after a snowfall and frost.

Upon a review of all the cases cited on the argument, and others in our Courts and in the Courts of the United States, and on consideration of the proper clauses of our Municipal Acts, I am of opinion that judgment should be entered for the plaintiff for \$200, the amount contingently assessed by the learned Judge, and full costs of suit.

I may remark, in conclusion, that, owing to a different state of circumstances in the old country, and differences in their statutes founded thereon, the English cases afford but little assistance towards forming a judgment in a case of this kind in this country. American cases are, for a contrary reason, much more applicable and useful.

January 6, 1885. WILSON, C. J.—From the evidence it appears Brown's gateway or doorway is to the east part of his property, and Dr. Hart said the slant begins a little east of Brown's door.

Mr. Bleakely says the blood he saw on the ground was a couple of feet east of Brown's window, and opposite the gateway.

The plaintiff said she fell at Brown's gateway, just as she had passed the corner of the house.

If she fell upon the incline, slant, or slide, as it is called, and it was a place where people, in passing along, would slide down, there is a strong case against the defendants, because there would be the badly constructed footway for the public use, and very little snow or ice upon it would make it dangerous, and there is evidence the plaintiff did fall upon that slant or slide.

In that case the motion must be made absolute, setting aside the dismissal of the action, and entering judgment for the plaintiff, and also for the \$200 damages assessed by the learned Judge, with costs.

ARMOUR, J., not having been present at the argument, took no part in the judgment.

Judgment for the plaintiff.

[CHANCERY DIVISION.]

RYAN V. SING.

Contract for sale of land—Authority to make—Agency—Variation in acceptance of terms of offer.

C. R. S., being the owner of certain leasehold property, wrote E. E. K., a land agent a letter in these words "Please call on J. J. R. He keeps a small shop * *. He resides in my house on P. Street, and has been wanting to purchase it for some time. Tell him if he gives me \$235, cash at once I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following date E. E. K., wrote J. J. R., as follows: "Mr. S. of Meaford wishes me to say that if you desire to purchase some property he owns on P. Street, that if you give him \$235 cash he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after an acceptance was endorsed in the latter letter in these words "I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R.

Upon an action being brought for specific performance by J. J. R., against C. R. S. It was

Held, that the letter from C. R. S., did not contain authority to E. E. K., to enter into a contract for the sale of the property.

Held, also, that even if there had been no question as to the authority of E. E. K., the insertion of the words "on the understanding that I pay no expenses," in the acceptance prevented it from being considered an acceptance of the offer said to be contained in the letter of E. E. K.

THIS was an action for specific performance or for damages brought by J. J. Ryan against C. R. Sing.

The case was tried at the Toronto Sittings on the 15th November, 1884, before Ferguson, J.

The evidence shewed that the defendant, who resided in Meaford, and was the owner of certain leasehold property in Toronto, wrote a letter on the 3rd March, 1884, to one E. E. Knott, a real estate agent in Toronto, which is set out in the judgment, to which letter Knott on the 4th March, 1884, wrote to the plaintiff the reply, also set out in the judgment, and on the 7th April following, the plaintiff called on Knott and endorsed on the letter of the 4th March an acceptance in these words: "I hereby accept the above on the understanding that I pay no expenses."

Murdoch, for the plaintiff. The plaintiff relies upon the contract of the 4th March and 7th April. That was signed by Knott pursuant to the letter of 3rd March from

the defendant. This authority was not revoked up to the time of the offer of the money. The contract was complete. The condition in the acceptance really means nothing when one looks at the offer. It was a complete acceptance. The tender of the conveyance is dispensed with by the terms of the contract, and the tender of the money is proved.

The letter of the 9th April has no effect on the contract completed on the 7th.

H. J. Scott, Q. C., for the defendant. The agency is not established. The letter of 3rd March is specific in its terms: *Hamer v. Sharp*, L. R. 19, Eq. 108, which case is also cited in *Fry on Specific Performance*, 2nd ed. 234, and *Dart on Vendors and Purchasers*, 5th ed. 183. The authority in *Hamer v. Sharp*, *supra*, was much broader than in this case: *Anderson v. McBean*, 12 Gr. 463. Then as to the contract, it is not a contract at all for the sale of the property which was leasehold, as it imports a contract, if at all, for a sale of the fee. The description was insufficient. It is not shewn that this was the only property of the defendant on Power street. Then the condition inserted as to the expenses must be treated as meaning something. The whole correspondence indicates that there was no *consensus*. The evidence shews that there was a rescission of the contract, even if any had existed.

Murdoch, in reply. *Hamer v. Sharp* is distinguishable from this case, as there the agent clearly exceeded his authority: *Fry on Specific Performance*, 2nd ed. ss. 486, 487 and 497.

November 17th, 1884. FERGUSON, J.—The only instructions that Knott (who it is contended was the agent of the defendant) had, were those contained in a letter from the defendant to him, bearing date the 3rd March. It is not contended that he had any authority from the defendant, but what is contained in this letter. The letter is in these words:

"Please call on J. J. Ryan. He keeps a small shop on west side of Francis street, near the market, just north of the market. He resides in my house, on Power street, and has been wanting to purchase it for some time. Tell him if he gives me \$235 Two hundred and thirty-five dollars, cash, at once, I will send the papers to you for him and he can pay over the money to you. Please write me by return mail."

What is relied on as the contract, specific performance of which is asked, is a letter from Knott to the plaintiff, written the 4th March, as follows:

"Mr. Sing, of Meaford, wishes me to say that if you desire to purchase some property he owns on Power street, that if you give him \$235 cash, he will send the deeds to me, and deliver them to you. Your early reply will very much oblige."

And an acceptance is endorsed on this letter which bears date on the 7th of April following, and is in these words, and signed by the plaintiff:

"I hereby accept the above on the understanding that I pay no expenses."

Unless Knott's letter and the acceptance written on the back of it contain a contract, there was no contract.

The record denies both the agency of Knott and the existence of the contract alleged.

I think the letter of the 3rd of March, to Knott, merely requested him to see the plaintiff and report certain information to him (that mentioned in the letter) and to write the defendant by return mail, and that it did not contain authority to him to enter into a contract for the sale of the property. I think he was merely asked to deliver a given message, and advise as to what might take place, and was not constituted an agent for sale, with power to sign an agreement binding upon the defendant.

I am also of the opinion that, even if there had been no question as to the authority of Knott, the letter of the 4th of March and the so-called acceptance of the 7th of April, do not shew a complete contract. The insertion of the

words "on the understanding that I pay no expenses," prevents the latter from being considered an acceptance of the offer said to be contained in the former, such as is necessary for the completion of a contract. On these subjects the cases referred to by counsel for the defendant seem to be pertinent, and I think it not difficult to find many others.

There are other objections to the alleged contract, and very strong evidence to shew an abandonment by the plaintiff of the contract supposed to have existed; but I do not think it necessary that I should discuss these subjects, as I am entirely satisfied that the plaintiff cannot succeed. I cannot accede to the argument of the plaintiff's counsel that the terms of the letter of the 4th of March shew that the reference made to expenses in the so-called acceptance can have no meaning, and is of no importance, and that the acceptance is therefore an unqualified one. I think the language of Sir Charles Hall, in the case of *Hamer v. Sharp*, L. R. 19 Eq, at p. 112, clearly indicates the contrary of this.

In my opinion no sufficient case is made by the plaintiff for specific performance, or for the recovery of damages from the defendant, and I think that the action must be dismissed, with costs.

Action dismissed, with costs.

The counter-claim was struck out by consent, during the trial, without prejudice to the existing suit in the Division Court, or to any suit for the demand contained in it.

G. A. B.

[CHANCERY DIVISION.]

WEST V. PARKDALE ET AL.

AND

CARROLL ET AL. V. PARKDALE ET AL.

Sub-way, construction of—Adjoining Municipalities—46 Vic. ch. 45, (O.)—Railway Committee of Privy Council—Order in Council—46 Vic. ch. 24, (D.)—Railways—Municipality performing work outside its limits—Ultra vires—Liability as wrongdoer.

T. & P., being adjoining municipalities obtained a special Act 46 Vic. ch. 45, (O.) providing for the construction of certain Railway sub-ways, part of which had to be constructed in each municipality. P. having disagreed with T. as to the terms, joined the railway companies in an application to the Railway Committee of the Dominion Parliament and obtained an order in Council under 46 Vic., ch. 24, (D.,) authorizing the companies to do the work which P. under an agreement with the companies undertook to do and commenced.

W. being a property owner in the municipality of T. in the neighbourhood of the works whose access to his property was cut off by the works brought an action for compensation under the special Act, which was resisted by P. on the ground that they were proceeding under the order in Council under the Railway Act, and that no compensation could be claimed except for land *taken* which was not done in this case.

Held, that the work was not being done by P. under the special Act, as it gave no power for one municipality to do the work required in the other, and that each municipality should have contracted for the work to be done within its own limits; and that before the work was let, the councils of the respective municipalities should have agreed upon the proportions in which the cost thereof including compensation for damages * * and the cost of future maintenance, should be divided and borne between the said municipalities which was not done.

Held, also, that the work was not done under the order in Council as the powers of the Railway Committee are exercised and exercisable only upon, against, and with respect to railway companies; that the Railway Committee have no power to direct a municipality, or any body or person to do any of the work, or bear any of the expense of any works which the companies may be required to do, and that the order in Council did not direct P. to do any of the work or bear any part of the expense thereof.

Held, therefore that P. was a wrongdoer, and answerable as such for the damage caused to the plaintiff, and bound to make compensation therefor.

THIS was an action brought by Richard West and Mary his wife, by Edward H. Boddy, her next friend, against the Corporation of the Village of Parkdale and the City of Toronto, which was tried with a similar action brought by Robert Carroll and William Henry Dunspaugh against the same defendants.

The statement of claim alleged that the plaintiffs are the owners in fee of land on the north side of Queen street, in the city of Toronto, having a frontage on Queen street of 142 feet, and bounded on the west by the Northern Railway and Dufferin street, and on the east by Gladstone avenue. The only means of access of any value to and from the land being by Queen street.

By the Act, 46 Vic. ch. 45 (O), it is provided the city of Toronto and the village of Parkdale may agree to construct subways with suitable approaches in order that the railways, crossing the street may pass above the street: and that the city and village shall agree upon the proportion of expense of construction to be borne by each: and that the city and village may pass by-laws and enter into agreements which may be necessary for the said construction: and that the Councils shall make to the owners or occupiers of or other persons interested in real property, entered upon, taken, or used by them or either of them, in the exercise of any of the powers conferred by the Act, or injuriously affected by the exercise of such powers, due compensation for any damages necessarily resulting from the exercise of the powers conferred by the Act beyond any advantage which the claimant may derive from the said work: and any such claim if not agreed upon shall be determined by arbitration, under the provisions of the Municipal Acts in that behalf.

The defendants have entered into an agreement with one Godson for the construction of a subway extending along Queen street, commencing at point easterly from the eastern boundary of the plaintiffs' land and extending into the village of Parkdale. And the defendants have, through their contractor opened up Queen street opposite the plaintiffs' land and have lowered the street and, will, unless, restrained, continue so to do.

The effect of the said work commenced and being performed by the defendants is to depreciate and injuriously affect the land of the plaintiffs to a very large extent, exceeding the sum of \$15,000.

The defendants have not passed any by-laws as required by the said Act, and are proceeding to the completion of the said work without legal authority so to do, and owing to the defendants not having passed such by-laws it is impossible for the plaintiffs to obtain compensation under the Municipal Acts.

By amendments to the statement of claim it was alleged that the city of Toronto are made defendants for conformity only, and that the plaintiffs claimed no relief against the city, and submitted that the other defendants should be ordered to pay the costs of the city.

The village of Parkdale in their statement of defence alleged that the subway is being constructed by certain railway companies under the alleged authority of and pursuant to the requirements of the Railway Committee of the Privy Council, in pursuance of an Act to amend the Consolidated Railway Act, 46 Vic. ch. 24 (D), and that such authority and requirement appear in and by an alleged report of the Committee of the Privy Council, approved of by His Excellency the Governor-General on the 24th of September, 1883; and that the railway companies and the said village have entered into an alleged agreement, dated the 24th of November, 1883, respecting the construction of the said subway, and that such agreement has been confirmed by a by-law of the said village, passed on the 3rd of December, 1883, and that the said subway is being constructed pursuant to the said agreement with the railway companies, and to a contract entered into by the village for the construction of the subway, and pursuant to the said authority and requirement of the Railway Committee, and the village claims they are not liable for any damages or injury to the plaintiffs by reason or on account thereof.

The plaintiffs allege that the true effect of the agreement between the railway companies and the village, and of the contract entered into by them for the construction of the subway, is that the subway is being constructed by the village, and not by the railway companies, and that the

village defendants are liable to the plaintiffs for the injuries and wrongs complained of.

The plaintiffs allege that even if the railway committee required or authorized the construction of the subway which the plaintiffs deny, the committee had no power to do so, and that even if so required and authorized the railway companies did not take the necessary steps under the statutes in that behalf prior to the commencement of the work, and did not file in the proper office in that behalf the necessary plans and book of reference, and the plaintiffs submit that the village cannot shield themselves from their responsibility in the premises by any order or requirements of the railway committee, or by any rights which may be possessed by the said railway companies.

The plaintiffs submit that the only authority under which the village can legally construct the subway, is the Statute of Ontario before referred to, and if it should be held by this honorable Court, that the defendants are authorized by the said statute to construct the same, and that their action in the premises is legal, and that the plaintiffs are entitled to compensation to be fixed by arbitration, pursuant to the Municipal Acts, the plaintiffs submit that the village shall be ordered to pass the necessary by-laws, and take the necessary proceedings connected with such arbitration, the plaintiffs offering on their part to take such proceedings. The plaintiffs claim that the village may be restrained from proceeding with the said work, and to replace the road in the state it formerly was, so as to give the plaintiffs the right of ingress and regress to and from their premises.

That by reason of the wrongful acts the plaintiffs have suffered damage to the amount of \$15,000 : that the village be enjoined from continuing the wrongful acts ; and that an order be made compelling the village to place the road in the same state it was before the works were commenced and for payment of the said damage and the costs of the action.

The plaintiffs also claim that a mandamus be issued

ordering the village to proceed to arbitration in case it is determined that the only mode by which the subway can be constructed is under the Act of the Ontario Legislature. And the plaintiffs claim such other and further relief as the nature of the case may require.

The city of Toronto by their statement of defence admit that Richard West is a contractor carrying on business in Toronto, and that Mary West is his wife. And they deny the remaining paragraphs of the statement of claim: and also that the alleged wrongful acts or any of them have been done by them or by any contractor or agent for them, or that they are in anyway liable in respect thereof: and they claim they should be dismissed, with their costs of the action.

The statement of defence of the village of Parkdale was originally in the like words and form. The amended statement of defence of the village of Parkdale is as follows:

The subway is being constructed by the Grand Trunk Railway Company, the Northern Railway Company, the Toronto, Grey and Bruce Railway Company, and the Credit Valley Railway Company, under the authority and pursuant to the requirements of the Railway Committee of the Privy Council, under the provisions of the 46 Vic. c. 24 (D).

The said authority and requirements of the Railway Committee appear in and by the report of the Committee of the Privy Council, approved of by His Excellency the Governor General in Council, on the 24th September, 1883 and to which report the defendants the village of Parkdale crave leave to refer.

The said village entered into an agreement with the railway companies to contribute an equal one-fifth share of the expense of the construction of the work, and at the request of the railway companies agreed to take control of the said work for the railways; but it was agreed that the agreement should not, nor should anything done under it by the village vary or affect the legal position of the

parties thereto under the Railway Act. And it was further provided in and by the said agreement that the said works should be constructed under the direction of one Joseph Hobson, an engineer appointed by the said railway companies, and that the work should be executed to the satisfaction of the engineer appointed by the said railway companies.

The agreement bears date the 24th of November, 1883.

A by-law of the said village was passed on the 3rd day of December, 1883, ratifying and confirming the said agreement.

The village has, pursuant to the terms of the said agreement, and on behalf of the said railways, entered into a contract for the construction of the said work under which the same is now being constructed, and pursuant also to the said authority and requirement of the Railway Committee, and under the direction of the engineer appointed by the said railway companies.

Save as aforesaid the village defendants have taken no part in the construction of the said subway and the same is not being constructed by them, and they claim they are not liable in respect of any damages or injury which may be sustained by the plaintiffs by reason or on account thereof. No action has been taken by the city of Toronto or by said village under the 46 Vic. ch. 45 (O).

ISSUE.

The case was argued on the 6th and 12th of May, 1884, along with *Carroll and Dunspaugh v. The City of Toronto and the Village of Parkdale*.

In West's Case,

S. H. Blake, Q.C., and Lash, Q.C., were for the plaintiffs.

In Carroll and Dunspaugh's Case,

S. H. Blake, Q.C., and Dr. Snelling, were for the plaintiffs.

In the two cases,

Robinson, Q.C., Foster, and McWilliams, were for the city of Toronto, and,

Osler, Q.C., and *J. H. Macdonald*, for the village of Parkdale.

It was admitted the plaintiffs in the actions had been damnified and were entitled to recover compensation therefor against some body or person, but the defendants did not admit that they were those bodies or that either of them was. It was argued that the city of Toronto having taken no part in any of the matters connected with the construction of the works were not properly parties in this cause. It was answered they were made parties for conformity only. It was required they should be bound by the proceedings taken in these cases, and therefore the actions could not be dismissed as against them, although they may in the end be entitled to their costs. And the case so stands as respects the city.

The principal remaining question is, whether the defendants, the village of Parkdale, are the parties liable for the damage of which the plaintiffs in the two actions complain?

The following documents were put in by the counsel for the village :

1. Certified copy of Order of Privy Council, 24th September, 1883, on the report of the Railway Committee, dated 21st September, 1883, authorizing and requiring the four named railway companies to do the work in question.

2. The agreement dated 24th November, 1883, made between the four railway companies and the village of Parkdale for the performance of the work.

3. The By-law No. 161 of the village of Parkdale to raise \$10,000 for the village portion of the expense of the work.

4. Resolution of the committee of the city of Toronto council consenting to the work being done. The city not to be called upon to pay any part of the expense, dated 17th July, 1883.

Put in by plaintiff's counsel.

5. By-law of Parkdale No. 160, authorizing the Reeve of the village to sign the contract with Godson, the contractor, for the execution of the work.

6. Notice by the village of Parkdale, 5th December, 1883, that application would be made to the Ontario Legislature for an Act to confirm the agreement between the four railway companies and the village, and to confirm by-law No. 161 for raising \$10,000 for the work, and to provide for the city of Toronto paying one-sixth of the cost of the work.

7. The report of the city of Toronto council, 27th August, 1883.

Osler, for the village, objects to it as evidence against the village.

Blake, contends it is admissible because it negatives the resolution of the council of 17th July, 1883.

Blake, the report was adopted by the council on the 27th August, 1883.

It was admitted that the proposed bill submitted to the Ontario Legislature, and the like bill for the Dominion Parliament were withdrawn because they were opposed by the plaintiffs and by the city of Toronto.

It was admitted that maps or plans, and book of reference respecting the work in question have not been filed in the proper office, according to the Railway Act.

It was admitted that the report of the committee of the city council and the adoption of it by the council were before the railway committee of the Privy Council, at which meeting the city and village were present by representation. And that the railway committee took no action upon such report and adoption of it by the city council, and proceeded with the matter then before it respecting the work, without regard to what the city of Toronto had done upon their committee report.

The documents put in shew:

That the committee on works of the city of Toronto by their report of the 17th July, 1883, stated it had been represented that the village of Parkdale had applied to the Railway Committee of the Privy Council for an order compelling the construction of a subway under the railways intersecting Queen street, or such other works as may be necessary in order to protect life and safety.

And that objection had been taken on the part of the railways that any such order would interfere with the streets under the control of the city, and that such interference would be resented by the city, and that legal steps (would be) taken in order to test the validity of any such action on the part of the Dominion Government. And they resolved that, so far as they had the power, they consented to any such works being constructed that may be necessary for the public safety and convenience, even although such works interfere with Queen street, Dufferin street, or any other streets under the control of the city.

Provided however, that such works be done under the direction and with the approval of the engineer appointed by the Railway Committee, and that the city be not called upon to pay any portion of the costs of the said works.

The report of the same committee of the 27th of August, 1883, refers to their former report of the 17th of July, and states that the committee have since learned that the intention was to build the subway only forty feet in width thus giving to the railways twenty-six feet of Queen street; and that permission was given to do the work upon the understanding that the subway would be built the entire width of the street, and they recommend the council to insist upon that being done, and that the plans before being finally adopted be submitted for the approval of the city council; they recommend also the city should be represented at the meeting of the railway committee of the Privy Council which was to meet the following day.

The committee also expressed regret that the council should have struck out of the report the clause of their former report relating to compensation for damage, if any, caused by the construction of the subway and they recommended the clause which read as follows, be now adopted.

“ And further, that if by the construction of the subway the property on Dufferin street and on Queen street east of the railway tracks is depreciated in value by said subway, compensation if needed be also paid by the railway companies and the Municipality of Parkdale.”

The following is a copy of the adoption of the report of Railway Committee of the Privy Council:

“ P. C. No. 1974.

Certified copy of a report of a Committee of the Honorable the Privy Council approved by His Excellency the Governor in Council, on the 24th September, 1883.

“ On a report dated 21st September, 1883, from the Railway Committee of the Privy Council, acting under the authority vested in it by the 46th Vic. ch. 24, stating that it has had under consideration the subject of the present level crossings of Queen and Dufferin streets, in the city of Toronto, by the tracks of the Grand Trunk, the Northern, the Toronto, Grey, and Bruce, and the Credit Valley Railways; and after hearing the representatives of the municipalities interested therein, and of the several Railway Companies, and it appearing that the village of Parkdale at the request of the Railway Companies has undertaken the control of the works as stated in a memorandum read before the Committee and duly filed on record.

“ That the committee deem it necessary for the public safety that the following Railway Companies, namely, the Grand Trunk Railway Company of Canada, the Northern Railway Company of Canada, the Toronto, Grey, and Bruce Railway Company, and the Credit Valley Railway Company, be authorized and required to carry the said Queen street under their several railways by means of a bridge or bridges and subway, with the necessary approaches thereto on Queen street from the east and west, and on Dufferin street from the south, and to execute all the works requisite therefor. The said subway to have a clear width of forty two feet, and a clear headway from the surface of the roadway to the underside of the girders of fourteen feet.

“ That the Committee further recommend the closing of Dufferin street from a point 150 feet south of its intersection of Peel avenue to Queen street, the same to be required as part of the works necessary for the public safety at the above mentioned railway crossings.

"That the said works are to be completed on or before the 31st day of March, 1884, and the whole to be in accordance with plans to be approved of by the Railway Committee.

"The Committee of the Privy Council concur in the above report, and the recommendations therein made, and they submit to same in conformity with the Act 46 Vic. ch. 24, for your Excellency's approval.

"JOHN J. MCGEE,
Clerk, Privy Council."

The agreement between the four railway companies and the village of Parkdale for the performance of this work, dated the 24th of November, 1883, recites:

That the village had caused certain proceedings to be taken under the statutes in that behalf, with a view to having the Railway Committee of the Privy Council order the construction of a subway on Queen street in the city of Toronto, and while such proceedings were pending the said parties agreed with each other as follows:

1. That a subway shall be made along Queen street under the roads of the said railways, and along Dufferin street south of Queen street, leading into the subway on Queen street, according to plans and specifications to be agreed upon by the said parties; and failing such agreement, as may be determined by Mr. Schrieber or such other engineer as may be appointed by the Railway Committee of the Privy Council.

2. That the said village shall, at the request of the said railways—of which request the execution of this agreement shall be complete evidence, but without varying and without prejudice to the legal position of any of the parties hereto under the Consolidated Railway Act of 1879 and the amendments thereto, take the control of the said work, with power to let contracts and compel the carrying out of the same, but said work shall be done under the direction of Joseph Hobson, or in the event of his death, or refusal to act, or removal from his position as engineer, under the direction of such engineer as may be agreed upon, and

failing an agreement, by an engineer to be appointed by the Railway Committee of the Privy Council, and said work shall be executed to the satisfaction of the inspector or engineer appointed by the said Railway Committee.

3. The work shall be put in hand at once and pushed forward, &c.

4. That the village and each of the railway companies shall at once pay into the Bank of Montreal, to the credit of a special account to be opened in the bank the sum of \$7,000, and if the same be not sufficient, then such further sum as may be sufficient to equal one-fifth of the deficiency.

5. Railway companies covenant to pay such sums, &c.

6. The moneys shall be withdrawn from the bank by cheque of the Reeve of Parkdale on the certificate of the engineer in charge of the said work, &c.

7. Village not to be liable for any expenditure by railway companies in altering grades, &c.

8. Each of the railway companies shall, at their own cost, provide the iron girders for carrying its railway tracks across the opening on Queen street; the village to pay the railway companies only \$1,500 for their share of the iron work.

9. Percentage to be held back from contractors; Dufferin street to be closed according to the order in council—any legislation, Dominion or Local, necessary to be applied for by the said parties; the legislation to provide that the city of Toronto shall pay one-sixth of all the expenses incurred in constructing the subway and obtaining such legislation, &c.

10. The width of the subway to be forty-two feet.

11. The streets to be kept in order by the municipality in which they are; the retaining walls, abutments, and over-head work to be maintained and kept in order by the railways at their own expense.

12. The railways assume no responsibility as to the draining of the subway into Queen street sewer.

13. The work is to be done in compliance with the said order of the Railway Committee, and nothing in the agree-

ment contained shall be taken to limit the powers of the said committee, or to remove the work from their jurisdiction or control or to prevent the said village from applying to the said committee to enforce the performance of the said work by the said railways in case of failure on their part or any one or more of them, and the fact of said village having the control of the work, shall be without prejudice to the legal position of any of the parties under the Consolidated Act and the amendments thereto, until the said work shall be fully completed.

14. The said railways do hereby declare that except for the purposes of this agreement they do not admit the jurisdiction of the said committee in the premises.

15. If any dispute arise as to any of the matters herein provided for, the same shall be referred to the decision of the engineer under the direction of the Railway Committee whose decision shall be binding upon the parties.

By-law No. 160 passed 28th November, 1883, by the village of Parkdale, authorized the Reeve and Clerk of the village to sign the contract with A. W. Godson, the contractor for the execution of the work.

By-law No. 161 passed 3rd December, 1883, by the village for raising \$10,000 to pay the expense of the said work, reciting among other matters the said Order in Council.

The notice of 5th December, 1883, before referred to by the village of Parkdale of the intention of the village to apply to the Ontario Legislature for an Act to confirm the agreement between the village and the railway companies, and also by-law No. 161 for raising \$10,000.

The village on the 27th of November, 1883, entered into a contract with Arthur William Godson, for the performance of the work,

Blake, Q.C., Lash, Q.C., and Dr. Snelling, for the plaintiffs, as before stated, argued. The Act 46 Vict. ch. 45 (O.) is the only authority for the acts being done which the plaintiffs complain of as occasioning them damage and injury, and which entitle them to compensation. By that

Act the city and village were empowered jointly or separately to contract with the said railway companies, and for the said railway companies jointly or separately, and each with the other or any of them and with Toronto and village councils or either of them to contract for the performance of the said work, and power is given to the councils to enter upon lands and close or divert streets for the purpose, and before letting out the work they were required to agree upon the proportions in which the cost of the work including compensation for damages should be divided and borne between the city and the village. The village has in pursuance of that enactment agreed separately with the railway companies as before mentioned, and separately also with Mr. Godson for the execution of the work, and having done so the village is liable under that Act to make the necessary compensation to the parties who have been injured by such works. The village must be so liable, or else they are wrongdoers altogether in which case they are also liable for damages. The village alone is doing the work, and must be answerable in some form or other for all the compensation or damage demanded. The village had no power to contract for itself, and also for the railway companies to do the work to pay for it, &c., and the consent of the city that the village should do the work was not a sufficient authority to the village to proceed as they have with this work. The Act was passed to remove any difficulty there might be in doing a work in which the two municipalities were interested, and which was to be done partly in the one municipality and partly in the other, and it provides for the compensation to be made to the parties injured being paid by the council of each municipality.

If the Railway Acts are to be considered, these companies have not observed the conditions of these Acts. They have not made a map or plan and book of reference according to the 42nd Vic. ch. 9, (D.) sec. 8 and sub-secs. of the alterations in question. Nor have they deposited a certified copy thereof in the office of the clerk of the peace of the

county, or in the office of the city clerk of Toronto, and until that be done the work should not have been proceeded with. This is a work which should have appeared in the original survey, and making of the railway, and therefore this alteration of their original plan should have been in like manner formally certified and filed as the statute requires.

If the work is being unauthorizedly done, the parties should be restrained. If they are proceeding rightfully they should be compelled to arbitrate. If there be an arbitration the Municipal Act of 1883, sec. 486, is, as well as the special act, binding upon the village.

The village say they are not doing the work under the Ontario Act, but under the Order in Council, and that such order is authorized by the 46th Vic. ch. 24, sec. 4, (48).

But that order, made in September, 1883, refers to a memorandum between the village and the railway companies read before the Railway Committee of the Privy Council, and duly filed of record, and that memorandum must have been agreed to between the parties to it under the Ontario Act.

They referred to: *Caledonian R. W. Co. v. Walker's Trustees*, 7 App. Cas. 259; *The Queen v. Eastern Counties R. W. Co.*, 2 Q. B. 347; *Moore v. Great Southern R. W. Co.*, 10 Ir. R. C. L. 46, 1859; *Beckett v. Midland R. W. Co.*, L. R. 3 C. P. 82; *Chamberlain v. West End, &c., R. W. Co.*, 31 L. J. Q. B. 201, 2 B. & S. 623; *Boadbent v. Imperial Gaslight Co.*, 26 L. J. Ch. 276; *Brine v. Great Western R. W. Co.*, 31 L. J. Q. B. 101.

Osler, Q. C., and *J. H. McDonald*, contra. The work has been done and is being done under the 46 Vic. ch. 24 sec. 4 being sec. 48 of the Act of 1879 as amended, and under the Order in Council adopting the report of the Railway Committee of the Privy Council. The Crown and the railway companies are therefore necessary parties to this action. [WILSON, C. J.—The village of Parkdale contend they are not liable at all, and it would be useless to join other parties with them.] If Parkdale is liable these

parties should be joined in the action. *Brice on Ultra Vires*, 2nd ed. 350. The railway companies alone are to make compensation to persons who are damaged by the works according to the General Railway Act of 1879, and the Amending Acts.

Although the 46 Vict. c. 45 (O.) was passed before the Order in Council was made, the by-law No. 161 for raising the \$10,000 was passed by the village of Parkdale under the Order in Council, and it was duly voted upon by a majority of the ratepayers under the Municipal Act, although that need not have been done under the above special Act 45 Vict. c. 45 sec. 8 (O.), and the by-law recites the Order in Council. The heads of agreement between the village and the railway companies were arranged before the railway committee, and upon these heads as a basis the Order in Council was made reciting them.

If compensation is claimed under the Municipal Act the pleadings should be amended. The plaintiffs now make claim against the village as wrongdoers, or as liable under the special Act of 1883, 45 Vic. ch. 45 (O.). If compensation is directed there must be a reference to arbitration to settle it: *Vandecar v. The Corporation of East Oxford*, 3 A. R. 131. See also *In re McArthur and The Corporation of Southwold*, 3 A. R. 295. If the work is being done under the Order in Council, the village are competent parties to do it as they have contracted.

The city of Toronto and the village of Parkdale should have acted together under the special Act. But the city refused to take any proceedings under it, and Parkdale was compelled to act alone. The proceedings of the village were therefore taken under the authority of the Railway Committee of the Privy Council, and if they cannot be supported by the Order in Council, made upon the report of the committee, the village has been proceeding mistakenly throughout and must be wrongdoers; but it is contended they have been and are proceeding legally, and in that case there is no provision for the village paying compensation of any kind to the parties damnified. The title to

compensation can only arise under the special Act, and that Act requires the councils of the two municipalities before letting the work shall agree upon the proportions in which the cost of the work including compensation for damages to parties who are injuriously affected by the work shall be borne between them. No such agreement had been made between the municipalities because the city would not act under the special Act and would be no party to the Order in Council. If the village had done anything illegally it is in doing the work as agent for the railway companies: *Dillon on Municipal Corporations*, 3rd ed. sec. 968. See also sec. 827.

S. H. Blake, Q.C., in reply. As to the alleged want of parties. The rule is, if the objection is raised by demurrer, the Court will consider whether relief can be given or not, but if it be not raised until the hearing, the Court will not consider it, if any relief can be given against the one who is a party to the action. The village desire that others may be joined against whom they may claim indemnity: *MacLennan's Judicature Act*, pp. 145-152. The village defendants have simply asked the Court to decide whether there is a legal liability in the action against them although there may be also a legal liability against some other party or parties. As respects the Crown, the claim to have it represented here may not arise because the plaintiffs allege the liability of the village arises under the special Act. The village has been put forward by the railway companies to do the work, and the village have agreed to do it, and the plaintiffs may proceed against the village alone. The special Act was passed with respect to this particular work and partly at the instance of the village. It is an Act which protects the persons who are injured by the works of the village and it is in agreement with the general Municipal Act which gives the like protection to such persons. It is said the 46 Vic. ch. 24 sec. 4, (D.), amending sec. 48 of the Act of 1879, does not entitle the plaintiffs to recover compensation in this case; because that section applies only when land is taken by

the railway company and no land is taken from these plaintiffs. If that section does not apply the plaintiffs may rely on the Municipal Act and upon the special Act.

The Court has power, if seised of the case, to give complete relief, and it would not be an extraordinary exercise of that power to direct a municipality to pass a by-law: *Scanlon v. London and Port Stanley R. W. Co.*, 23 Gr. 559; *Tully v. Farrell*, 23 Gr. 49; *The Queen v. Metropolitan Commissioners, &c.*, 22 L. J., Q. B., 234.

As to the liability of the village Corporation for tort, *Brice on Ultra Vires*, Cap. 9, was cited by the defendant's counsel, and replied to by the plaintiff's counsel.

September 2nd, 1884. WILSON, C. J.—The plaintiffs have been greatly damaged in their property by the construction of the subway on the line of Queen street, and of the works in connection with it, and they should of right be compensated for the injury done to them. These propositions are not disputed, they are admitted; but it is said they have not a legal right to the compensation which they claim because the work is done, it is alleged, under the order of the Governor in Council upon the report of the Railway Committee of the Privy Council, made under the authority of the 46 Vic. ch. 24, sec. 4 (D), amending sec. 48 of the Consolidated Railway Act 1879, and that section does not give compensation for lands injuriously affected, but provides only that “all the provisions of law at any such time applicable to the taking of lands by railway companies and its valuation and conveyance to them, and to the compensation therefor, should apply to the case of any land required for the proper carrying out of the requirements of the railway committee,” and no land is taken by the railway companies from these plaintiffs. It is contended the work is carried on under the Order in Council because: 1. There is an Order in Council in fact directing and authorizing the four named railway companies to do the work in question, and that Dufferin street

be closed from a point 150 feet south of its intersection with Peel avenue to Queen street as part of the works.

2. The village of Parkdale by a memorandum read before the Railway Committee of the Privy Council as mentioned in the Order in Council "at the request of the railway companies has undertaken the control of the works"; and by the memorandum is to pay one-fifth of the cost of the subway.

3. By the agreement between the railway companies and the village of Parkdale, the village at the request of the railway companies has taken the control of the work, and has assumed to let contracts for its performance, but without prejudice to the legal position of any of the parties to the agreement under the Railway Act of 1879 or of its amendments.

The work by the agreement was to be done in compliance with the Order in Council, and nothing contained in the agreement shall be taken to limit the powers of the Railway Committee or to remove the work from their jurisdiction or control or to prevent the village from applying to it to enforce the performance of the contract by the railway companies in case of failure by any of the companies to perform their part. And the whole of the agreement shews the parties to it were acting under the Order in Council and the provisions of the General Railway Act.

4. The village by-law No. 161 shews also the \$10,000 required to be raised was for the purpose of paying the expenses of the work directed to be performed by the Order in Council. Such order having been obtained upon the agreement that the village should pay one fifth of the cost of the same, and

5. The notice of the intention of the village to apply for legislation was for the purpose of confirming the agreement between the village and the railway companies, and to compel the city of Toronto to pay one sixth of the expense of the work, and to confirm the by-law No. 161. And the village therefore insist that as they say the whole of their

proceedings have been taken under the Railway Act of 1879 and its amendments, and under the Order in Council. They are not responsible in these actions for the damages claimed because there is no such liability cast upon them by the Railway Acts or by the Order in Council, as no land has been taken from the plaintiffs and therefore they cannot be required to arbitrate with respect to the claim for damage or compensation. The village also say their proceedings under the Order in Council have been legally and rightfully taken, and that they cannot be treated as wrongdoers, and be required to replace the roadways as they were, and to indemnify the plaintiffs for the damages they have sustained.

The plaintiffs, on the contrary, say. The village is not proceeding in fact under the Railway Consolidation Act of 1879 and the amendments of it, or under the Order in Council, but under the Ontario Special Act 46 Vic. ch. 45. In which case they are entitled to call upon the village under the Municipal Act or under the Special Act to refer the matters of claim to arbitration. But if the village are not proceeding under the special Act the plaintiffs say the village have no authority to do the work in question under the Order in Council or under any other authority whatever—in which case they are wrongdoers and are bound to satisfy the plaintiffs in damages to be assessed in the action against them. The village although they were petitioners along with the city for the passing of the special Act do not assume in any of their proceedings to be acting under it, but to be acting under the Order in Council.

The first section of the special Act authorizes the village and the city, jointly or separately, and the railway companies, jointly or separately, and each with the other, or any of them, and with the municipal councils, or either of them, to enter into contracts for the construction of the work.

Under that section the municipalities and the railway companies have the power to agree that the work shall be

done, that is be done by some one, other than the municipalities, or the companies, or the municipalities, jointly or separately, could agree with the companies, jointly or separately, to do the work themselves; but it does not appear to me the companies or any of them under that section could do the work without the co-operation of the municipalities. Under the second section, "The said councils, either jointly or separately, may enter into any contract with any person or persons who may be willing to undertake the same:" that is, the councils, or either of them, may do the work independently, or without the concurrence, or even against the will of the railway companies.

By section three: "The said councils shall, before letting any such contract or entering upon the construction of any such work * * mutually agree upon the proportions in which the cost thereof including compensation for damages * * and the cost of future maintenance, shall be divided and borne between the said municipalities respectively."

That has not been done, because the city of Toronto have refused to bear any portion of the expense of the work, and because also when they gave their consent to the village doing the work upon the streets within the city limits, it was upon the condition not only that the village should bear the entire expense of the work, but upon "the understanding that the subway would be built the entire width of the street, and your committee now recommend that the council insists upon this being done: and that the plans before being finally adopted, be submitted for the approval of this council."

By section four it is required "the said councils shall make to the owners or occupiers of or other persons interested in real property entered upon, taken or used by them or either of them in the exercise of any of the powers hereby conferred upon them, or either of them, or injuriously affected by the exercise of such powers, due compensation for any damages, including cost of fencing when required, necessarily resulting from the exercise of such powers

beyond any advantage which the claimant may derive from the said work * * and any such claim for compensation, if not mutually agreed upon, shall be determined by arbitration under the provisions of the Municipal Act, and amendments thereto in that behalf."

The effect of this section is, that if the work be done by the municipalities under the independent power conferred upon them to contract without regard to the railway companies, the municipalities were to bear the whole cost of the work including damages for compensation.

There could be no objection however to the railway companies agreeing in any manner they pleased with the municipalities or with either of them to bear a part of the expense of the works, including the claim for compensation and this is what they have done.

The Act was passed to enable the work which had to be done, and which lay partly in the city and partly in the village—but mostly in the city—to be completely done, and for that purpose it was necessary both municipalities should join in the contract.

It was not contemplated that one of the municipalities should do the work which had to be done in the other municipality, nor has the Act made any provision to that effect, nor has the one municipality the right under the Act to authorize the other of them to let out the work or to contract for the performance of it for and on behalf of the non-contracting municipality, nor do I think that either municipality could contract with the other to do the whole of the work in both municipalities. It would be beyond their power so to contract.

To make a valid contract under the special Act it was necessary the municipalities should by a joint or separate agreement contract for the performance by each of them of the work to be done within their respective limits; or for the performance by the railway companies by a joint or separate agreement with them, that the companies should each perform the work undertaken to be performed by them jointly or separately within the limits of the respective

municipalities, or for the performance by any other body or person who should contract to do the work within their respective limits.

And it was necessary also, before the work was let, that the councils of the respective municipalities should have agreed "upon the proportions in which the cost thereof, including compensation for damages * * and the costs of future maintenance shall be divided and borne between the said municipalities."

There has been no such contract made, and I am of opinion the contract which has been made is not a contract which was made, or which was authorized to be made under that Act. The village do not attempt to support it as a contract made under the Act, and do not say they ever assumed to be proceeding under the Act. On the contrary, the whole of their proceedings have been taken, or are assumed to have been taken, under the Order in Council. I shall now therefore refer to the Order in Council.

The clauses in the Railway Consolidation Act 1879, under the head *The Railway Committee*, show the powers of the Committee are exercised, and are exercisable only upon, against, and with respect to railway companies.

The 48th section of that Act, as amended by the 46 Vic. ch. 24, sec. 4, gives power to the Railway Committee, in a case like the present, where the railway crosses the highway upon the level, to require the railway company to submit a plan and profile "of such portion of the railway for the approval of the committee; and the Railway Committee, if it appears to them necessary for the public safety, may, from time to time, with the sanction of the Governor in Council, authorize and require the company to whom such railway belongs, within such time as the said committee directs, to carry such highway either over or under the said railway, by means of a bridge or arch, instead of crossing the same on the level, or to execute such other works as, under the circumstances of the case, appear to the said committee the best adapted for

removing or diminishing the danger arising from the then position of the railway, or to protect such highway by a watchman, or by a watchman and gates or other protection ;" and a penalty of \$50 a day is imposed upon the railway company while the works remain uncompleted after the date fixed by the committee for their completion.

The Railway Committee have no power to direct any municipality or any body or person to do anything whatever, in or with respect to the execution of the works or to bear any part of the expense of them, which the companies may be required to execute. And in the Order of Council of the 24th of September, 1883, made respecting this work, the Railway Committee have not ordered or directed the village of Parkdale to do the work or any part of it or to bear the expense or any part of it.

The Order in Council keeps strictly within the provisions of the statute. It declares "that the committee deem it necessary for the public safety that the following railway companies," (naming those as before mentioned) "be authorized and required to carry the said Queen street under their several railways by means of a bridge or bridges and subways with the necessary approaches thereto on Queen street, from the east and west of Dufferin street from the south, and to execute all the works requisite therefor." And it states with respect to the part which the village of Parkdale has agreed to take in this matter as follows: "And it appearing that the village of Parkdale at the request of the railway companies has undertaken the control of the works as stated in a memorandum read before the committee and duly filed on record."

The Order in Council did not require of the village of Parkdale to do any act whatever, in or with respect to the execution of this work. When, therefore, the village by agreement with the railway companies assumed the control of the work it was not by or under the authority of the Order in Council, nor was it by or under the authority of the special Act.

The statute required the municipality to do, or to con-

tract for the doing of the work, and to pay the expense of it and the damages resulting from it. The Order in Council required the railway companies to do the work, and as a consequence at their own expense, to pay also such claims which might be made upon them by others as in the case of lands taken by the companies.

The special Act requires the city and village shall agree upon their respective shares of the *future maintenance* of the work. The railway Acts and the agreement between the village and the companies cast the expense of that upon the companies.

The village had not the power to contract under the statute for the performance of the work situate in the city of Toronto. And the consent of the city assuming such consent to have been given, would not and could not authorize the village to exceed their proper statutory powers.

The village so far as the city is concerned have put their body forward as the mere agent and representative of the railway companies, and that position the village has not the power to assume. It can assume no other or greater powers or authority than are conferred upon it by the Municipal Acts or by the special Act.

The provision in the agreement between the village and the railway companies of the 24th of November, 1883, that such assumption by the village shall be "without varying and without prejudice to the legal position of any of the parties hereto under the Consolidated Railway Act of 1879, and the amendments thereto," means that the village and the agents and representatives of the railway companies, for the village have no such duty or obligation cast upon them, nor have the village any such powers as the doing of this work "under the Consolidated Railway Act of 1879, and the amendments thereto."

I am of opinion the work is not being done under the special Act for the reasons before given. The village have not observed its terms, and have not assumed to act under it, but only under the Order in Council; and they have

exceeded their powers as to all the work done in the city of Toronto, and that applies to the action brought by West and his wife whose property is situate in Toronto.

I am of opinion, as before stated, the village are not authorized by the Order in Council to do the work, and could not be authorized, as the order could have no binding effect in law. But if the order could confer such a power the village would not be liable, because a liability arises under it only in those cases in which lands have been taken, and none have been taken here. And I think it is quite clear, as the village have not proceeded under the special Act they cannot be compelled to go to arbitration. They are in effect wrongdoers, and answerable as such for the damage they have caused to the plaintiffs and others by reason of these works. The railway companies might also have been proceeded against as wrongdoers; but even if they are wrongdoers, the plaintiffs were not obliged to join all the parties to the wrongful act in an action charging them *ex delicto*.

It may be the city of Toronto could, in like manner, have been made parties to the action because they gave their consent to the performance of the work; unless it is established that their consent was withdrawn because the subway was not made the full width of Queen street. Whether others than the village of Parkdale could have been made co-defendants with the village is now of no moment. I do not think the railway companies could be said to be doing the work by the village as their agents. The village is the only contracting party, and is paying for it by means of funds raised from the property-holders within their municipality as an ordinary municipal work. If the companies could be treated as principals, it would follow the village would be their agents; but I do not think the relation of principal and agent exists between them. The village, in such a case, cannot legally act as agents.

At present I am obliged to find that the village of Parkdale are doing the work in question, unauthorizedly,

and, on that ground, wrongfully, and that they are bound to make compensation to the parties injured, and I decree against them accordingly, with the costs of the action. And I refer the question of compensation to the Master; or, in case it should be desired by the parties, or by either of them, or be thought by the Court to be more desirable to have another referee than the Master, then such other referee may be appointed.

And with respect to the city of Toronto. As the plaintiffs have not pressed their case against the city, this action will, as regards the city, be dismissed, and the costs of the city will remain over for consideration to be mentioned again.

I am disposed to think the matter now in litigation will never be satisfactorily settled unless the city, the village, and the companies can agree to terms of arrangement, or unless the rights and liabilities of the parties are determined by legislation, and I need not say it would be wiser and better to make that settlement by a friendly and peaceable accommodation if possible.

I entertain very great doubt whether the village could be required to pass a by-law relating to the work lying within the confines of their own municipality, because the special Act requires the proportions of the expense of the work, and of the damages to be paid by way of compensation shall be settled between the city and the village to be borne by each before the work is begun, and an arrangement also made between them as to the future maintenance of the work.

G. A. B.

[CHANCERY DIVISION.]

McLACHLIN ET AL V. USBORNE ET AL.

MAGEE V. USBORNE ET AL.

Will—Power to appoint new trustees—Payment to retired trustee—Husbands as trustees for their wives—40 Vic. c. 8, s. 30, O.—R. S. O. c. 107, s. 30.

A testator devised certain properties to H. F. M., J. H. M., and D. M., as tenants in common, and charged the same with \$100,000 to be paid by them to his son, and two daughters, married women, share and share alike, through his wife, M. M., as trustee as therein mentioned; and directed that at the death of M. M. the said \$100,000 should be held by the said devisees and their survivors on the trusts of the will, "unless my said wife shall have previously appointed, by will or otherwise, any other person or persons to be a trustee in her place, which I hereby authorize and give her power to do."

On November 5th, 1873, M. M. by deed professed to nominate and appoint L. R. and J. U., to be trustees in her place under the will, and afterwards by another deed of October 6th, 1877, again appointed L. R. and J. U. to be such trustees.

Held, that the will only authorized M. M. to appoint a trustee to be such after her death, and neither of the above appointments of L. R. and J. U. were authorized by the will,

Held, however, that although R. S. O. c. 107, s. 30, could not be invoked to authorize either appointment, since it did not come into force till December 31st, 1877, yet under 40 Vic. c. 8, s. 30, O., assented to on March 2nd, 1877, the latter appointment was a good and valid one, for that Act applies to the case of a trustee appointed before the passing of it, who desires to be discharged from the trust, and consequently money paid to M. M. as such trustee, after the appointment of October 6th, 1877, did not discharge the debt.

40 Vic. c. 8, s. 30, O., is very broad in its language, and a trustee who has from the beginning been a sole trustee, has, under it, the same position and power as a last retiring trustee, or a sole surviving trustee.

Seem, that 40 Vic. c. 8, s. 30, O., is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority.

Held, also, that the fact that L. R. and J. U. were the husbands of the female *cestuis que trust*, although it appeared from the will that the testator intended that the legacies should be free from the control of any present or future husband, did not make the appointment of them bad, although it might be that if the Court were appointing trustees of the fund, the husbands of the *cestuis que trust* would not be appointed.

THESE were two actions, one brought by Hugh Frederick McLachlin and Claude McLachlin, as plaintiffs, against John Usborne, Lindsay Russell, Maria McLachlin, Jessie Usborne, and Harriet Russell, defendants; and the

other by Charles Magee, as plaintiff, against John Usborne, Lindsay Russell, and Maria McLachlin, defendants.

The object of both actions was in effect the same, viz: to obtain from the defendants a release or discharge of certain mortgages on the ground that the said mortgages had been fully paid and satisfied.

The facts of the case are stated in the judgment.

The two actions came on for trial together at Ottawa, on October 21st, 1882, before Ferguson, J., when there being no dispute as to the facts, the argument as to the law was adjourned to Toronto, and took place on November 21st, 1882.

J. Bethune, Q. C., *W. Cassels*, and *Walker*, for the plaintiffs.

40 Vic. c. 8, s. 30, R. S. O. c. 107, s. 3, was passed after the making of the will, and after the death of the testator. The statute is prospective only, not retrospective: *Hardcastle* on Statutes, p. 185. The question is really one of the construction of the will only; and that guards against the husbands being trustees. The husbands are not capable of being trustees. Moreover, under the will the widow could make no appointment of trustees which would take effect during her lifetime. See *McEvoy v. Clune*, 21 Gr. 515; *Re Jackson's Will*, 13 Ch. D. 189; *Perry* on Trusts, 2nd ed., p. 365.

Gormully, for the defendants. As to the husbands being improper trustees, it must be remembered the two are trustees for each wife. See as to who may be trustees: *Lewin* on Trusts, 7th ed. pp. 29, 38; *Re Davis's Trust*, 12 Eq. 214. But whether they are proper trustees or not the only persons who can complain are the *cestuis que trust*. Then again the appointment in this case was after the passing of the Act, though the will and death of the testator were before it. The original Act, and not the revised statute, must be looked at, for all was completed before December 31st, 1877. See *Maxwell* on Statutes, pp. 200-2; *Page v. Bennett*, 29 L. J. Ch. 398; *Noble v. Meymott*, 14 Beav. 471; *Hardcastle* on Statutes, p. 134.

January 26th, 1884. FERGUSON, J.—The late Daniel McLachlin by his last will gave and devised certain valuable properties to his sons, Hugh Frederick McLachlin, one of the plaintiffs, John Harrington McLachlin and Daniel McLachlin, their heirs and assigns, as tenants in common, and charged the same with the sum of one hundred thousand dollars (the said sum being one-half the estimated value of the properties), to be paid to his son Claude McLachlin, and his daughters Harriet Russell and Jessie McLachlin share and share alike. He also directed that the property should, after his death, be valued in a manner by the will pointed out, and that after the value should have been so ascertained his three sons to whom the properties were devised and given should, instead of paying the sum of one hundred thousand dollars as aforesaid, pay one-half of the amount at which the properties should be valued. He gave directions as to the manner of payment, and that his sons to whom the properties were given should, if they desired it, have time for payment of the principal money, stating what times should in such case be given and that interest should be paid, the portions of such coming to each of his daughters to be paid into her proper hands, for her separate use, independent of any husband, present or future, and so that such daughter should not have power to deprive herself thereof by sale, mortgage, charge, or otherwise by way of anticipation.

It is admitted that the properties were valued and that the estimate placed upon them by the testator proved not to be too large. The will provided that the share of each of the daughters in the capital of the "Trust premises" should be paid to the testator's wife—widow—and should be by her invested in and upon such stocks, funds, and securities as were thereafter mentioned, with power to vary the same from time to time, directing that the widow should, during the life of each daughter, pay the interest, dividend, and proceeds of her share into her proper hands for her separate use, independent of any present or future husband, with a clause against anticipation, and certain

provisions in case of the death of either of the daughters which I think it unnecessary to state here. The will then proceeds in the same paragraph thus: "And at the death of my said wife I do hereby direct that the said trust premises shall be held by my said sons, Hugh Frederick McLachlin, John Harrington McLachlin, and Daniel McLachlin, and the survivors and survivor of them, and the executors and administrators of such survivor upon the like trusts in all respects and with the same powers as are herein declared respecting the same, unless my said wife shall have previously appointed by will or otherwise any other person or persons to be a trustee or trustees in her place, which I hereby authorize and give her power to do."

As security for the payment of the amount payable to the defendant Maria McLachlin, the widow of the testator as trustee in respect of the legacies given and charged as aforesaid, the plaintiffs executed to her a mortgage upon valuable lands and also assigned to her by way of mortgage a certain mortgage made by one Charles Magee. These documents were executed on the sixth day of October, 1877. The will bears date the twenty-seventh day of June, 1871. The testator died on or about the day of

The testator's daughter Harriet, I assume from the names that appear, married the defendant Lindsay Russell.

The widow by an indenture bearing date the fifth day November, 1873, after reciting therein the portions of the will relating particularly to the trusts in respect of which she was appointed trustee, and the part giving to her the power to appoint a trustee or trustees in her place which I have above set forth, but not mentioning or referring to the apparently important words: "And at the death of my said wife," professed to nominate and appoint the defendants Lindsay Russell and John Usborne to be trustees in her room and stead for all the purposes for which she was a trustee under or by virtue of the will or such of the same purposes as then remained to be performed, and were capable of taking effect, and granted and

assigned to them all the trust moneys and property by the will directed to be paid and given to her as such trustee, to hold the same upon the trusts, and with the powers upon and with which the same ought to be held by virtue of the will, and they by the same instrument covenanted well and faithfully to perform all the trusts, &c.

Afterwards by a deed poll bearing date the 6th day of October, 1877, the widow again appointed the defendants Lindsay Russell and John Usborne, to be trustees in her place, and assigned and transferred to them the mortgage of that date given her as such trustee by the plaintiffs.

For the purposes of the suit it is admitted that the plaintiffs paid to the widow, Maria McLachlin, the sum of \$66,666.67, that being the sum payable by them as the shares of the defendants Harriet Russell and Jessie Usborne of the \$100,000; and that \$10,462 of this was paid on the 6th day of October, 1877, and \$56,204.67 was paid on the 25th of May, 1881, together with all interest due thereon; and that such payments were made to her, the plaintiffs contending that she was trustee under the will notwithstanding any alleged appointment by her, the defendants Russell and Usborne however not consenting thereto. It is also admitted for the purposes of the suit that the said sum of \$10,462 was handed over by the widow to the defendants Usborne and Russell, on the 18th of October, 1877; that she is about 64 years of age; that since the death of her late husband she has lived with her son Hugh McLachlin, one of the plaintiffs; that she has not handed over to the defendants Usborne and Russell, the sum of \$56,204.67, which was paid to her after she had handed over to them the \$10,463; that the instruments dated the 6th of October, 1877, were drawn by the same solicitor, and were prepared with the knowledge of the plaintiffs, but not with their assent or dissent, and also with the knowledge of the defendants Jessie Usborne and Harriet Russell, and there were other admissions for the purposes of the suit, chiefly in regard to documents intended to be

put in evidence, which I think it not of importance to mention here. The defendants Usborne and Russell have registered the appointments and assignments.

The plaintiffs (a) say that they have paid the whole amount of the mortgage money and interest in full, and that they are entitled to a discharge of the mortgages from Usborne and Russell, that they have applied for such discharge or release, and that they have been met by a refusal, and that for want of such release or discharge they are prejudiced, and they ask amongst other things an order against these defendants for such release or discharge.

The defendants Usborne and Russell in their defence say that the moneys (the \$56,204.67) have not been paid to them, that they rely upon their appointment as trustees being good and upon the assignment to them, and for these reasons they refuse to give the release or discharge, and they say that they have at all times been ready and willing, and are now ready and willing to discharge the mortgages upon the moneys thereby secured being paid to them in accordance with their rights as mortgagees.

It was agreed by counsel that the only matter that need be considered or determined is, the question as to whether or not the appointment or appointments by the widow, of the defendants Usborne and Russell as trustees in her place and stead, and the assignments and transfers by her to them were good and valid.

On the part of the plaintiffs it was contended that the power given to the widow by the clause in that behalf in the will did not authorize or empower her to make any appointment of a trustee or trustees in her place which would or could take effect during her lifetime, and that the appointment or appointments of these defendants made by her were unauthorized and void, and that the payment of the moneys to the widow was a good payment and entitled them to a discharge of the mortgages.

(a) The plaintiffs, H. F. McLachlin and Claude McLachlin, now represented the whole of the devised estate, as they did also at the time of executing the instruments of October 6th, 1877.

On the part of these defendants the contrary of this was contended and reliance was also placed upon the Statute of Ontario, 40 Vic. ch. 8, sec. 30, R. S. O., ch. 107, sec. 30. This Act, 40 Vic. ch. 8, was assented to on the 2nd of March, 1877. The Revised Statutes of Ontario came into force on the 31st day of December in the same year.

The mortgages were assigned in October, 1877. The first appointment was the 5th of November, 1873, and the other on the 6th of October, 1877, the same day that the assignment was made. The transactions in question took place anterior to the time when the Revised Statutes took effect as law.

The section in the original Act, 40 Vic., c. 8, is as follows :

“TRUSTEES—FILLING VACANCIES.”

30. “Whenever any trustee either original or substituted and whether appointed by the Court of Chancery or otherwise, dies or desires to be discharged from, or refuses or becomes unfit or incapable to act in the trusts or powers in him reposed before the same have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any) or if there be no such person or no such persons *able and willing to act*, then for the surviving or continuing trustees or trustee for the time being, or the acting executors, or executor, or administrators, or administrator of the last surviving or continuing trustee, or for the last retiring trustee, by writing to appoint any other person or persons to be a trustee or trustees in place of the trustee or trustees dying, *or desiring to be discharged*, or refusing, or becoming unfit or incapable to act as aforesaid, and so often as any new trustee or trustees is or are appointed as aforesaid, all the trust property (if any) which for the time being is vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustees or trustee, shall with all convenient speed be conveyed, assigned, and transferred, so that the same may be legally and effectually vested in such new trustees or trustee, either solely or jointly with the surviving or continuing trustees, or a surviving or continuing trustee, as the case may require ; and every new trustee to be appointed as aforesaid, as well before as after such conveyance, assignment, or transfer as aforesaid, and also every trustee appointed by the Court of Chancery, *either before or after the passing of this Act* shall have the same powers, authorities, and discretions, and shall in all respects act as if he had originally been nominated a trustee by the deed, will, or other instrument creating the trust.”

“2. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of a testator.”

The deed of appointment of the 6th day of October, 1877, recites the fact of the appointment of Maria McLachlin, the widow, by the will of her late husband as trustee, and that she was desirous of being discharged from the trusts or powers in her reposed as such trustee, the same not having been fully performed or discharged, and then appoints John Usborne and Lindsay Russell to be trustees in her place, and assigns and transfers to them the mortgage of the 6th of October, 1877, before referred to, describing it, and stating the purposes for which it was given her, and all the covenants, conditions, &c., in the mortgage contained and grants to them the lands in the mortgage mentioned.

As to the power given by the will to the widow Maria McLachlin to appoint a trustee or trustees in her place, I am of the opinion that it did not authorize her to appoint a trustee or trustees to be such trustee or trustees in her place during her lifetime. By it I think she was only empowered to appoint "by will or otherwise" a trustee or trustees to be such after her death. The testator appointed her to be the trustee, and he appointed that his three sons named in this clause of the will, and the survivors and survivor of them, &c., should be the trustees at her death, unless she should have by will or otherwise appointed trustees to be trustees after her death. I think this is the meaning and the whole meaning in this respect of this clause in the will on which there was so much argument, and I think, as I have said, it did not empower the widow to appoint any persons to be trustees during her lifetime. It was argued that the words, "in her place," occurring in the clause indicated that the trustees appointed by her might be trustees during her lifetime; but I cannot take that view. When I read the whole clause I think it an impossible view. It seems to me to provide only for trustees after her death. How could she by her will appoint trustees to be trustees in her lifetime? and yet that is the manner of appointment by her which is specifically mentioned. I think the sense and meaning of

the clause are clearly as I have said, and I am of the opinion that neither the appointment of the 5th of November, 1873, nor the one of the 6th of October, 1877, was authorized by the power contained in the will. It was not argued or even suggested that the appointments, or either of them, were good unless authorized by the will or the statute.

It was contended by the plaintiffs that the statute does not apply to the cases of trustees who were appointed before it was passed and therefore not to this case, for the appointment of the widow took effect long before the passing of the Act, but I cannot think this contention can prevail. I think the words in the early part of the section are too plain to admit of it. It says: "Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, dies or desires to be discharged," &c. I think this means any trustee who is a trustee at or after the time of the passing of the Act.

As the transactions were anterior to the time when the Revised Statutes of Ontario took effect, I think the provisions in the original Act are the ones to be considered as applicable, and that the arguments having their foundations upon the provisions of other sections placed in the same chapter as this one in the Revised Statutes cannot prevail for this reason if there were none other.

The Act in which the section in question is found is entitled "An Act to provide for certain amendments of the law," and consist of a large number of sections on a variety of subjects. There is necessarily no preamble, nor is there, as far as I can perceive, anything from which any aid can be derived in ascertaining the meaning of the Legislature beyond the meaning of the words they employed in the section.

It was contended on the part of the plaintiffs that the section is prospective and not retrospective. I have examined on this subject the authorities to which I was referred, and I think this contention is correct thus far,



namely, that the section would not make valid an appointment, made prior to the passing of the Act in which it is contained, without authority. The rule found in Hardcastle on Construction of Statute Law, p.195, is this: "Unless there is some declared intention of the Legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that Act is prospective and not retrospective." The author gives a number of exceptions to this rule, but I do not see that this case falls within any of them. In the case of *Gardner v. Lucas*, 3 App. Cas., at p. 603, Lord Blackburn says: "But where the effect would be to alter a transaction already entered into, where it would be to make that valid which was previously invalid, to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding—I think the *prima facie* construction of the Act is, that it is not to be retrospective, and it would require strong reasons to shew that this is not the case. * * We must apply the ordinary rule in considering Statutes, and say it is not retrospective for such a purpose as this, there being no evidence of intention on the face of the language to make it retrospective."

Now, assuming that the view that I have stated in regard to the power contained in the will is correct, and assuming that there was no other authority of making the appointment of the fifth of November, 1873 (and as I have before said it was not even suggested that there was any), and applying to the case this language of Lord Blackburn, the conclusion seems to me that this appointment was unauthorized, and is void.

Then as to the appointment of the 6th of October, 1877, Mr. Gormully spoke of this as a confirmation of the former one of 1873. It does not on its face appear to be this, but on the contrary an independent appointment. It is a deed poll, short it is true, but, nevertheless, reciting the two principal facts, the existence of the office, and the desire

on the part of the widow to be discharged from it (which last is not only the substance of, but the words employed by the statute to express one of the causes on account of which an appointment of new trustees may be made under its provisions), it contains apt words to make the appointment, and to transfer the mortgage mentioned in it. The statute was then in force, and according to the view that I have taken as to the early parts of the section, it provides in effect that any sole trustee desiring to be discharged from the trusts may, when no person has been appointed for the purpose of the deed, will, or other instrument (if any) creating the trust, or when there is no such person able and willing to act, by writing, appoint any other person or persons to be a trustee or trustees in his place, for, I think, one who has been a sole trustee from the beginning has the power given by the Act to a last surviving or continuing trustee, or a last retiring trustee, and unless there is some reason against it other than the want of authority alleged, I do not perceive why this appointment of the 6th of October, 1877, made after the passing of the Act, and before the Revised Statutes came into force is not good. In order to enable one to say that there was not authority to make this appointment, it would be necessary to hold that the provisions of the Act had no application in the case of a trustee appointed before the passing of the Act who desired to be discharged from the trusts. As I have before said, my opinion is the contrary of this.

It was contended by the plaintiffs that owing to the fact that the trustees appointed are the husbands of the *cestuis que trust*, and the intention of the testator being manifest on the face of the will that the legacies given to his daughters should be free from the control of any present or future husband, the appointment even if otherwise good was for these reasons void. In answer to this it was said that the husband was not in either case made the sole trustee for his wife, and counsel referred to *Lewin on Trusts*, 7th ed., p. 38, where the author refers to some cases on the

subject; one in which the Court appointed two new trustees, and in doing so, appointed the husband of the *cestuis que trust* as one of them, on his undertaking that if he became sole trustee he would immediately take steps for the appointment of a co-trustee, and another where the husband of *cestuis que trust* in remainder were appointed trustees. It may, however be, that if the Court were appointing trustees of this fund, the husbands of the *cestuis que trust* would not be appointed, but that is not the question with which I have to deal.

If the appointment under the provisions of the statute is otherwise good, I do not see that it could be held bad upon this ground, for the statute is in this respect very broad, authorizing the appointment of any person or persons to be a trustee or trustees, &c.; and, as I have already said, I think this trustee, who was from the beginning a sole trustee, was, under the Act, in the same position and had the same powers as a last retiring trustee or a sole surviving or continuing trustee. I am for the reasons that I have given of the opinion that this appointment of the 6th day of October, 1877, is authorized by the Act and a good appointment. It follows that the defendants Usborne and Russell are trustees of the fund. It is admitted that they have not been paid or tendered the mortgage money, and the plaintiffs' action or bill must be dismissed, with costs.

MAGEE V. USBORNE.

This suit was tried in conjunction with the one above. Magee the plaintiff is the mortgagor in the mortgage that was assigned to Maria McLachlin. It is admitted that he had knowledge of the material facts of the assignment of it before the payment of the money. The money has not been either paid or tendered to the defendants Usborne and Russell, and as stated by counsel the matters for decision are the same in each case. The bill in this case must also be dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

EXCHANGE BANK OF CANADA V. SPRINGER ET AL.

EXCHANGE BANK OF CANADA V. BARNES ET. AL.

*Principal and surety—Bond guaranteeing good conduct of bank cashier —
Negligence of obligees—Connivance—Onus—Production of documents—
Death of surety—Continuing guarantee.*

In an action against the sureties under a bond guaranteeing the honesty of one M. as cashier of the plaintiffs' bank, charging misappropriation of funds by M., the defendants set up, as a bar to recovery, neglect of the directors of the bank in not examining the books, so as to detect any malversation on M.'s part.

Held, that to sustain this defence the sureties must shew connivance between the plaintiffs and M., or a very strong case of negligence, which they had not done in the present case.

The chief reliance of the surety, in such a case, ought to be, in the honesty of the man whose honesty he has guaranteed.

It is not sufficient for a party to any litigation on whom the *onus* is to say that he could furnish the necessary proof if he had certain papers.

It is his duty to have these papers, or to have them produced, the means of causing their production being what the law deems ample.

When the engagement of a surety is a contract and not a bare authority, it is not usually revoked by his death, and his estate remains liable to the same extent as he would have been if he had lived.

THESE actions were brought by the Exchange Bank of Canada, the one against Lewis Springer and C. R. Murray, and the other against Thomas Barnes, executor of the last will of George Barnes, deceased, and the said C. R. Murray, seeking to recover certain sums alleged to be due to them under two several bonds, identical in form, given, the one by the defendants Springer and C. R. Murray, and the other by the said George Barnes and C. R. Murray, to them, to secure the proper discharge by the said Murray of his duties as cashier of the bank.

The two actions were tried together at Hamilton, on October, 22nd, 24th and 25th, 1881, before Ferguson, J., and the facts are sufficiently stated in his judgment.

J. Bethune, Q. C., and *Patterson*, for the plaintiffs. The guarantee is a continuing one : *Royal Ins. Co. v. Davies*, 40 Iowa, 469 ; *Brandt* on Suretyship, sec. 113 ;

Bradbury v. Morgan, 31 L. J. Ex. 462, 1 H. & C. 249. The bank had no notice of the death of Barnes till after all the defaults had occurred: *Harris v. Fawcett*, L. R. 8 Ch. 866. If the guarantee was not continuing, notice of the death should have been given, but it was not. It is not enough for Murray to say as to any money that went to his account that it was used for the purposes of the bank, without shewing how. He should have preserved evidence to shew that the directors dealt with intentional dishonesty. There is no evidence that the directors knew of Murray's account being overdrawn. Again in all cases in which sureties have been released, the release was upon the construction of the contract, but the bond in this case is incapable of being so construed as to support the surety's contention here. We refer to *Dedham Bank v. Chickering*, 3 Pick. 335, S. C. 4 Pick. 314; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Murray v. Gibson*, 28 Gr. 12; *Price v. Kirkham*, 3 H. & C. 437; *Brandt on Suretyship*, sec. 369; *Regina v. Pringle*, 32 U. C. R. 308; *Hamilton and Port Dover R. W. Co. v. Gore Bank*, 20 Gr. 190; *Molson's Bank v. Corporation of Brockville*, 31 C. P. 174; *Grant on Banking*, 2nd ed., p. 225; *Peel v. Tatlock*, 1 B. & P. 419; *Bonar v. MacDonald*, 3 H. L. Cas. 226; *DeColyar on Guarantees*, p. 270; *Shepherd v. Beecher*, 2 P. Wms. 288; *Watts v. Shuttleworth*, 7 H. & N. 353; *Ex parte Agra Bank, in re Barber & Co.*, 9 Eq. 725; *Municipal Corporation of East Zorra v. Douglas*, 17 Gr. 462; *North British Ins. Co. v. Lloyd*, 10 H. & G. 523; *Peers v. Oxford*, 17 Gr. 472; *Coulthart v. Clementson*, 5 Q. B. D. 43; *Bonar v. MacDonald*, 3 H. L. Cas. 226.

S. H. Blake, Q. C., for the defendants. The directors induced Murray to speculate; it was a part of their plan and he was forced to do it, in order to keep his place. He became no longer merely cashier. His position was changed. The directors were bound to make themselves acquainted with what was going on: *Morae* on Banking, pp. 91-3, 124. The general principle is, that

what is done becomes the act of him who stands quietly by and allows it to be done. Murray saw the directors were going to make him a scapegoat, so he left. Is it possible Murray's account could have been so overdrawn, and the bank not know of it? I refer to *Morse on Banking*, pp. 196, 206, 219, 220, 222, 230-1, 237, 240-1; *Phillips v. Foxall*, L. R. 7 Q. B. 666. The bond was not a continuing bond. It ceased on Barnes's death. The word "cashier" being used in it shews the character of the business in which, or in regard to which the sureties were bound. At all events the words of the bond do not extend in any view of the case to an employment except of the same character. See *Harris v. Fawcett*, 15 Eq. 311; *Offord v. Davies*, 12 C. B. N. S. 748; *Smith's Merc. Law*, 9th ed., p. 475; *DeColyar on Guar.*, pp. 182-3, 337; *Sanderson v. Aston*, L. R. 8 Ex. 73; *Brandt on Suretyship*, p. 459; *Napier v. Bruce*, 8 Cl. & Fin. 470; *Bank of Upper Canada v. Covert*, 5 O. S. 541; *Leigh v. Taylor*, 7 B. & C. 491; *Pybus v. Gibb*, 6 El. & B. 902; *Joint Stock Discount Co. v. Brown*, 8 Eq. 381; *In re London, Hamburg and Continental Exchange Bank*, 5 Ch. 444.

R. Martin, Q. C., on the same side. The acts of the directors, enabling Murray to get the fund into his hand, amounted to connivance: *Dawson v. Lawes*, 1 Kay. 280; *Blake v. Albion Life Ass. Society*, 4 C. P. D. 94. The bank has been paid off by the directors, to recoup whom this action can alone be maintained. They should have been made parties. See *Ashhurst v. Mason*, 20 Eq. 225; *Ford v. Proudfoot*, 9 Gr. 478. The omission of a duty by the party claiming discharges a surety: *Watts v. Shuttleworth*, 5 H. & N. 235; *Hamilton v. Watson*, 12 C. & F. 109; *Holme v. Brunskill*, 3 Q. B. D. 495. The bank has lost the evidence in the case, and having done so cannot recover on suspicion, or on an unexplained doubt of their own creating. I refer to *Stiles v. The Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 310; *Bradley v. Riches*, 9 Ch. D. 189; *Bostock v. Floyer*, 1 Eq. 26.

March 4th, 1884. FERGUSON, J.—THE action is upon a bond in the penal sum of \$5000, entered into by the defendants, on the 1st day of December, 1876, to the plaintiffs as security for the conduct of the defendant Murray as cashier of the plaintiffs' bank at the head office of the bank in the city of Montreal, to which position or office he had been appointed. The condition of this bond is as follows :—

“ Now the condition of the above written bond or obligation is such, that if I, the said Charles Robert Murray, do and shall from time to time and at all times hereafter, so long as I shall continue in the service or employ of the said Exchange Bank of Canada, (hereafter called ‘the Bank’) in the capacity aforesaid (‘cashier’) or in any other capacity at the said branch or agency, or at any other branch or agency of the bank or at the chief seat of business of the bank, honourably, diligently, and faithfully demean and conduct myself in such service or employ and use my utmost endeavours for the benefit and advantage of the bank, and willingly obey all the lawful commands of the bank touching my duties therein, and shall in all instances, as well whilst in the service or employ of the bank as after I shall be discharged therefrom, retain and keep secret, except from the president and directors of the bank and such officers and other employees thereof as shall be entitled to knowledge, all such transactions or affairs relative to the affairs of the bank as in the course of such service or employ shall be entrusted to me, or shall either directly or indirectly come to my knowledge ; and shall also duly, truly, and regularly render and deliver to the bank or to such person or persons as the bank shall from time to time appoint for that purpose, a just, true, and faithful account in writing of all such moneys, securities for money bills, notes, bonds, deeds, writings, books, securities, goods, chattels effects, matters and things whatsoever, as have or shall from time to time come to my hands, custody, or charge, of or belonging to the bank or to the correspondents or depositors thereof or therein or to any other person or persons whomsoever, wherewith the bank shall or may be chargeable : and also, if we the said obligors, or either of us, or one or either of our heirs, executors, or administrators shall and do make and give or cause to be made and given unto the bank their successors and assigns, full and entire satisfaction in lawful money of Canada, for all such moneys, securities for money, bill, bonds, notes, deeds, writings, books, securities, goods, chattels, effects, matters and things whatsoever, of or belonging to the bank as aforesaid as at any time or times shall appear to have come into the hands, custody, or charge of me the said Charles Robert Murray, and shall not be by me duly and faithfully accounted for to the bank, or which shall be found, confessed, or proved to have been or to be lost, wasted, misapplied or otherwise made away with or unjustly detained by me the said Charles Robert Murray, or by any other person or persons by

or through my means privity or procurement, and shall from time to time and at all times hereafter save, defend, and keep harmless and indemnified the bank of from and against all and all manner of actions and suits, cause and causes of action and suit, sum and sums of money losses, costs, damages and expenses, liabilities and engagements, claims and demands whatsoever, which shall and may from time to time and at any time hereafter be commenced and prosecuted, enforced, sustained, incurred or made against by or upon the bank or the estate, property or effects of the bank for or by reason or by means or on account of the breach, non-observance or non-performance of all or any of matters or things aforesaid on the part of me the said Charles Robert Murray, or obtained by reason or by means of my misconduct or of any act, deed, matter or thing done, or neglected, or omitted to be done by me, then the above written bond or obligation shall be void, otherwise the same shall be and remain in full force and effect."

The bond contains this further agreement and declaration :

" And it is hereby expressly agreed and declared that in all cases where any sum or sums of money shall become payable under and by virtue of the above written bond or obligation, the same shall be ascertained and determined in manner following, that is to say : An account in writing purporting to be an account of the sum or sums of money so payable to the bank, shall be made out and stated from the books and writings of the bank, and signed by the cashier, manager, agent, accountant, book-keeper, or other officer of the bank, and such account so signed shall be *prima facie* evidence against us, the obligors and each of us, and our and each of our heirs, executors, and administrators, that the sum or sums of money stated in such account to be due and payable to the bank as aforesaid, is or are so payable, and that in the event of any action or suit being brought or prosecuted at law or in equity upon or by reason of the above written bond or obligation such account shall be received and admitted in any Court or Courts whatsoever, whether at law or in equity, wherein such action or suit may be prosecuted as *prima facie* evidence that the sum or sums of money stated in such account to be due and payable to the bank as aforesaid, is or are so due and payable, and that neither the bank nor any officer of the bank shall be compelled or required to produce in verification of such account the books, documents, or writings of the bank, and that a verdict, judgment, or decree shall pass accordingly in such action or suit as to such sum or sums of money, *reserving nevertheless* to us the said obligors and our respective heirs, executors, and administrators who may be parties to such action or suit and before any verdict, judgment or decree therein full power to establish by satisfactory proof, to be adduced conformably to the practice of such Court or Courts that the sum or sums of money stated in such account as being due and payable to the bank is or are not so due and payable in whole or in part as the case may be ; Provided always, that this clause shall not have effect unless a copy or

duplicate of such account shall have been delivered to the party or parties who are to be the party or parties to the action or suit in which such account is to be offered in evidence personally or shall be sent by post to the address of such party or parties at his or their known or last known residence or place of business, six clear days prior to the commencement of such action or suit, calculated from the time of delivery personally or of the putting into the post office, as the case may be, of the copy or duplicate of such account as aforesaid. And it is hereby further agreed and declared that from the time of the said account being delivered or sent as aforesaid, lawful interest shall become due and payable to the bank on the balance thereby appearing to be due to the bank, and such interest shall be recoverable under and by virtue of the above written bond or obligation."

This bond is joint and several, and is expressed to be binding upon the obligors, the defendants, their and each of their respective *heirs, executors, and administrators*.

The defendant Murray accordingly entered the service of the plaintiffs, as cashier at their head office in the city of Montreal, and continued in the plaintiffs' service till the 22nd of February, 1879, when he absconded to the United States.

This suit was commenced in May, 1879, the bill being then filed against the defendant Springer, and in March, 1881, it was amended by making the defendant Murray a party.

The breaches of the bond sued on alleged by the plaintiffs are as follows: For facilitating the business of the plaintiffs' bank an account in the name of the defendant Murray as cashier in trust, was kept in the books of the plaintiff at their head office, and moneys the property of the plaintiffs, were to be deposited to the credit of and withdrawn from the said account for the purposes of the plaintiffs' said business, and the defendant Murray taking advantage of the existence of this account and in direct violation of the provisions of the said bond drew cheques on the said account and thereby withdrew from the same during the period commencing the 9th of January, 1877, and ending the 16th of October, 1878, the sum of in all \$27,462.75, which he, the defendant Murray, unlawfully and without the knowledge or consent of the plaintiffs

lost, wasted, misapplied, and made away with, and used for his own private purpose and personal advantage, save and except the sum of \$2,050, which he refunded to the plaintiffs by two cheques dated respectively September 12th, 1877, and January 17th, 1879, leaving a balance overdrawn by the defendant Murray on the said trust account of \$25,412.75, and that the defendant Murray also taking advantage of his position of trust as cashier of the plaintiffs' bank and while he remained cashier overdrew his ordinary private account current with the plaintiffs to the amount of \$3,435.62, and overdrew his private United States currency account to the amount of \$857.22, and thereby deprived the plaintiffs of these several sums of money over and above all that he was entitled to as his salary as cashier of the bank or in any other way up to the time when he absconded, and that acting as such cashier the the defendant Murray so unlawfully and in violation of the said bond deprived the plaintiffs of and took and applied to his own purposes and uses and lost, misapplied, and wasted, and made away with the aggregate sum of \$29,705.59, and in so doing failed and neglected to faithfully and honourably perform his duty to the plaintiffs and that by reason of his said misconduct the defendant Murray caused a loss to the plaintiffs of the said sum of \$29,705.59.

Before suit the plaintiffs delivered or caused to be delivered to the defendant in accordance with the provision in that behalf in the bond sued on an account and statement expressed to have been compiled from the books and writings of the plaintiffs' bank exhibiting the said sum of \$29,705.59 against the defendant. This bearing date March 21st, 1879, is signed by the inspector, and is under the seal of the plaintiffs and shews on its face and in detail what is alleged as the breach of the bond for what the suit is brought. It was admitted that this account and statement which is Exhibit 5, was served or delivered the required time before the commencement of the suit. It was also admitted that if the plaintiffs were

entitled to succeed there was a loss far exceeding the amount of the penal sum in the bond. At this stage, and looking at the right or not of the plaintiffs to recover upon the contract according to its terms only, the burden is cast upon the defence to establish by satisfactory proof that the sums of money stated in the account above mentioned as being due and payable to the plaintiff, are not so due and payable.

For this, the defence relies upon the evidence of the defendant Murray, (a) and, as pointed out by Mr. Patterson his evidence is wholly unsatisfactory upon this subject. He is willing to say and does say that he did not use any of the moneys of the trust account for his own private purposes. He, however, admits that he did draw cheques on this trust account for his own purposes, but he says that he recouped this account by drafts on his private account. He says he cannot tell or show at all in detail how these transactions were owing to his not having certain memoranda which he says were or ought to be in the bank, and the plaintiffs' witnesses say that these memoranda were not to be found in the bank. Murray says he left them there when he went away, and the plaintiffs say they cannot be found. In this respect the defendants had the ordinary means of procuring evidence, the *onus* was plainly upon them and their contract required them to furnish satisfactory proof. It cannot be said that when the *onus* is upon a party to any litigation it is sufficient for him to say that he could furnish the necessary proof if he had certain papers. It is his duty to have these papers or to have them produced, the means of causing their production being what the law deems ample. If the documents are his evidence and they are lost or cannot be produced, the misfortune is his, and he cannot be said to have proved his case, because he says he could prove it if he had certain papers, or rather says he cannot prove it without the papers, and intimates that he could if he had

(a) Mr. Murray was examined under a commission at Niagara Falls, in the State of New York.

the papers. On this branch of the case I am of the opinion that the defendants' evidence does not satisfy the *onus*, and that they fail. But the defence says, that owing to certain alleged conduct and negligence on the part of the directors of the bank, the plaintiffs cannot recover against the defendant Springer at all. This alleged conduct and negligence has regard to dealings by the plaintiffs in stocks and neglect or want of diligence of the directors in not examining the books and knowing from time to time and at all times how they were kept and precisely what entries were being made and what business done, so that they would have been able to detect and would have detected any errors of Murray and notified his surety the defendant Springer, for they say they did not know of his alleged defalcations until after he had absconded.

The plaintiffs were the holders at one time of a large amount of Montreal Telegraph stock, as it appears, for advances made upon it, and owing to the failure of certain brokers they had to take this stock as their own. It was to their interest to keep up the price of this stock in the market, so as if possible to avoid a large loss upon it, and on the 24th day of February, 1877, as shewn in the evidence of Mr. Gault (b), a resolution was passed at a meeting of directors in these words: "The president, vice-president, and Mr. Buntin were appointed a committee to advise with the cashier respecting the Montreal Telegraph Company stock held by the bank, and to deal with it in whatever way they deem desirable for the interest of the bank;" and on February 28th, 1877, an agreement was entered into between the plaintiffs acting through their cashier Murray, and Mr. Caverhill the vice-president, stating the manner in which Montreal Telegraph Company's stock should be purchased, it being deemed advisable to make purchases of it in order to the keeping up of its market price. There was much dealing no doubt

(b) This was Mr. Hamilton Gault, president of the Exchange Bank.

in this stock and I think with, the object already stated, and there was a large loss upon it which it is said that the directors of bank personally assumed and paid. But no claim is made in regard to any of the dealings in this stock or any of the dealings spoken of in the evidence which some of the directors or Murray had in respect of the stock of the bank itself.

There were dealings by Murray and by some of the directors in other stocks. These dealings or speculations on the part of Murray were apparently extensive, but it is, I think, almost, if not entirely impossible, from the voluminous evidence and large number of exhibits, to ascertain with any considerable degree of accuracy the way in which these dealings were carried on. I have perused both as carefully as I have been able, for the purpose of ascertaining just what was done, and I have not been successful. Murray, who should know all about it, says that he cannot tell without seeing certain entries and papers which have not been found. He seems to insinuate that the plaintiffs should find and produce them. But in the view that I have taken of the case this is perhaps not so important as was thought at the trial. After having perused the many authorities that were referred to by counsel, and considered their arguments as well as I have been able, I have, notwithstanding the statements in *Morse* on Banking, apparently leading in a contrary direction, arrived at the conclusion that to sustain this defence the surety must show connivance between the plaintiffs and his principal. True, a surety may frame and prove a defence of the kind that was successful in the case *Phillips v. Foxall*, L. R. 7 Q. B. 666, but that has not been attempted here.

There are many authorities showing that negligence is not fraud, but that it may be evidence of fraud. In the same way, I apprehend, it may be said that negligence is not connivance, but may be evidence of connivance, but the degree of negligence that would be proof of fraud or connivance may be difficult to state. I think it very

difficult. In *DeCollyar* on Guarantees, at p. 337, it is stated that in order to discharge the surety there must be on the part of the obligee such an act of connivance or gross negligence amounting to a wilful shutting of ones eyes to the *fraud* or something approximating to it. The surety has the right to call upon the obligee to dismiss the employed if he is guilty of an act for which he may be dismissed; and if the employed has put it out of his power to comply with this request of the surety by continuing the employed in his service when he ought to have dismissed him, the surety is discharged: see *Sanderson v. Aston*, L. R. 8 Ex. 73. The chief reliance of the surety is, and I think ought to be, in the honesty of the man whose honesty he has guaranteed to another, and, unless an act of connivance is affirmatively proved a very strong case of negligence must be made out. I cannot think that the surety is in a position to say to the employer, you should have so diligently watched the conduct of the man whose honesty I guaranteed to you that no serious wrong could have been accomplished by him.

On this question of connivance or not, after having read the evidence—a great part of it more than once—for the purpose of determining it. I think I must find that it has not been proved. The words of the contract sued upon are very comprehensive, as much so as those of any contract of the kind that I have ever seen. The evidence of the plaintiffs' directors shows that Murray was always cashier, but a change of his office would not, I apprehend, make any difference, as the contract contains the words, "*in the capacity aforesaid, or in any other capacity.*" On the whole case I am of the opinion that the plaintiffs are entitled to judgment for \$5,000, and according to the contract sued on, interest from the time of the delivery of the account and statement Exhibit No. 5, which date is the 22nd of March, 1879. The total sum is, principal and interest, \$6,488, and there will be judgment for the plaintiffs for this sum, and other costs of suit.

EXCHANGE BANK V. BARNES.

This suit was tried with the other, (*Exchange Bank v. Springer*,) the only difference between the two suits being that this one is against Thomas Barnes, the executor of George Barnes, who executed the bond with Murray. He, George Barnes, having died as is stated in the answer of the defendant about the 30th of June, 1877. The contract sued on in this suit, is precisely the same as that sued on in the other suit.

“ When the engagement of a surety is a contract and not a bare authority, it is not usually revoked by his death, and his estate remains liable the same as he would have been if he had lived : ” *Brandt on Suretyship*, sec. 113.

Where a bond stipulated that the surety bound himself and his heirs, executors, and administrators, it was held that his liability for his principal was not terminated by his own death, but extended to his heirs and legal representatives : *Royal Insurance Co. v Davis*, 40 Iowa, 469.

It seems that Mr. Buntin had knowledge of Barnes's death shortly before Murray went away, but that the other directors did not know it, nor did the board of directors know it till after Murray absconded. I do not think the entry of one word in a book spoken of sufficient under the circumstances, to fasten notice upon the board of directors. No notice is shown to have been directly given of the death of Barnes ; and I am of the opinion that the plaintiffs are, in this suit, entitled to judgment for the same sum as in the other suit—namely, \$6,483, and their costs of suit.

There will be judgments in both suits accordingly. But as the evidence in the suits appears to have been taken in the same way as if there had been only one of the suits in existence ; and the suits having been tried together, I apprehend the costs cannot be much different from the costs of one suit. How the defendants are to share their costs, may be a matter for the taxing officer, I do not say how that is at present.

A. H. F. L.

[CHANCERY DIVISION.]

WARDROPE V. THE CANADIAN PACIFIC RAILWAY
COMPANY ET AL.

Garnishee proceedings—Debtor and creditor—Attaching plaintiff not a “creditor” of garnishee—Evidence of official documents—27 Vic. c. 57 s. 10.

A judgment creditor does not, properly speaking, become a creditor of the garnishee by service of an attaching order upon the latter. The garnishee continues to be debtor to his own creditor, the judgment debtor, until he has paid the amount owing into Court, or to the attaching creditor, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied.

Held, therefore, that the plaintiff, who had obtained a garnishee order, garnishing a debt due from the Brockville and Ottawa Railway Company to W. S., his judgment debtor (which railway was now represented by the defendants), was not a “creditor” of the said company, holding a *bond fide* claim against it within 27 Vic. c. 57 s. 10.

A copy of an order and of a writ of execution issued pursuant thereto admitted in evidence, an official in the office where the same had been filed, testifying that he had made the copies from the originals which were proved to have been lost.

A memorandum or entry in a book in the office of a sheriff, in the handwriting of the deputy sheriff, purporting to be an entry of the receipt of a certain writ by the sheriff, admitted in evidence, subject to objection, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting and the place from which the book was produced.

THIS was an action brought by John Wardrope against the Canadian Pacific Railway Company, and the Canada Central Railway Company, claiming an order against the defendants, or either of them for payment to him of a certain money claim, or a mandamus compelling them to issue to him certificates of stock to the amount of his claim under the circumstances set out in the judgment.

The action was tried at Toronto, on May 18th and 21st, 1883, by Ferguson, J.

The facts of the case are set out in the judgment.

After the close of the plaintiff's case,

Lash, Q. C., and *Walker*, for the defendants, moved for a dismissal of the plaintiff's action on the ground that

he has made out no case (a). The statute operates in favor of creditors of the Brockville and Ottawa Railway Company, but the plaintiff was not a creditor. The garnishee proceedings have not been properly proved, or the service of the attaching order, but even assuming them to have been regular, Sykes continued to be a creditor of the Brockville and Ottawa Railway Company, which shows the plaintiff could not have been the creditor for the same amount at the same time: *Blevins v. Madden*, 11 C. P. 195; *Sykes v. The Brockville and Ottawa R. W. Co.*, 22 U. C. R. 459. Both cannot at once be the creditor for the same money. Wardrope was not a creditor of the railway at all. As judgment creditor he has only the right to which the statute gives him, viz., the execution. There is no transfer of the debt at all. See C. S. U. C. ch. 24, sec. 15; *Sunderland Local Marine Board v. Frankland*, L. R. 8 Q. B. 18; *Cremetti v. Crom*, 4 Q. B. D. 225; *Drake on Attachment*, 5th ed. p. 362, sec. 451a. If for any reason a garnishee becomes discharged from the claim of his creditor, he is also discharged from the claim of the judgment creditor of his creditor. The Judge's order in garnishee proceedings is not a judgment. It does not merge the debt, nor can an action be brought upon it.

J. MacLennan, Q.C., and *Francis*, for the plaintiff. Any one who has a claim against another which he can enforce by legal proceedings is a creditor. The statutory liability is upon the garnishee to pay the judgment creditor. He is indebted to the creditor. The Judge's order is a judgment, and execution will go upon it, and may be the foundation of garnishee proceedings. Suppose the garnishee appeared and disputed the debt, proceedings would then be had similar to those upon a writ of revivor, and would not the judgment on these proceedings be a judgment properly so called? The order is a judgment, and may be entered on the roll at any time: and the garnishee on payment of the money would be entitled to have satisfaction entered upon

(a) Only so much of the arguments of counsel are noted as relate to the question whether an attaching party is a "creditor" of the garnishee.

he roll. It is not necessary, however, to contend that it is a judgment, for the service of the order shall bind the debts in the hands of the debtor under the statute. Then the plaintiff was a creditor when the Act of 1863 was passed.

March 19th, 1884. FERGUSON, J.—The action is against The Canadian Pacific Railway Company and the Canada Central Railway Company.

The plaintiff states that on the 12th day of April, 1862, he recovered a judgment in the Court of Common Pleas for Upper Canada, against one William Sykes, for the sum of \$5,655.38 (£1,413 16s. 9d.), and that William Sykes sometime before that date had recovered a judgment in the Court of Queen's Bench for Upper Canada against the Brockville and Ottawa Railway Company for a large sum, \$100,000, or thereabouts: that on the 13th day of May, 1862, the plaintiff by a garnishee proceeding in the said Court of Common Pleas obtained an order by which the Brockville and Ottawa Railway Company were ordered to pay to him, the plaintiff, forthwith after the service of the said order on them, so much of the debt due by them to the said William Sykes as would be sufficient to satisfy his the plaintiff's claim; and that in default of such payment, execution against the goods and chattels of the said the Brockville and Ottawa Railway Company was ordered to be issued: that on the 15th day of May, 1862, the said order was served on the Brockville and Ottawa Railway Company, and that it was served on Sykes on or about the 12th day of May, 1862: that on or about the 24th day of May, 1862, he, the plaintiff, caused to be issued out of the said Court of Common Pleas, pursuant to the terms of the said order, a Writ of *fiери facias* addressed to the sheriff of the united counties of Leeds and Grenville, being the counties in which the Brockville and Ottawa Railway Company had their offices and principal workshops, directing the said sheriff out of the goods and chattels of the said the Brockville and Ottawa Railway Company to levy the

amount of his the plaintiff's said debt, together with other sums, charges, and expenses endorsed on the said writ: that on the 28th day of May, 1862, the said writ was placed in in the hands of the sheriff, and that on the 13th day of June, 1863, the sheriff made his return to the writ (which had been kept in full force), whereby he certified that the Brockville and Ottawa Railway Company had not within his bailiwick any goods and chattels whereof he could make the amount of the plaintiff's debt, and the other charges thereon endorsed or any part thereof.

The plaintiff then refers to the Act of Parliament of Canada, 27 Vic., cap. 57, whereby it is amongst other things enacted that (sec. 10) after certain preferential extension bonds should have been issued by the said the Brockville and Ottawa Railway Company, and a certain deposit or payment made as in the Act before provided, but not before, and in order to facilitate the liquidation of that company's liabilities, the said the Brockville and Ottawa Railway Company might issue to all creditors holding *bonâ fide* claims against them including all coupons in arrear at the time of the issuing of the said scrip, and in exchange therefor, bonds or debentures of the company ranking equally with ordinary bonds of the company then already issued, and together with such bonds next after the said preferential extension bonds, to an amount equal to the claim of each creditor, and he alleges that the conditions in the Act mentioned, precedent to the issue of such bonds or debentures to the creditors of the company were performed.

The plaintiff then refers to an Act of the Legislature of the Province of Ontario, 31 Vic. cap. 44, whereby it is amongst other things enacted that the ordinary bonds of company in the Act mentioned with their overdue coupons should be converted by the holders thereof into new paid-up stock in the capital of the company (which capital was by this Act fixed at the sum of \$500,000) that the old paid up stock of the company should also be converted by the holders thereof into new paid-up stock, all on certain terms as in the act mentioned, that the conversion should take

effect immediately after the passing of the Act, and that from that time the bond-holders, coupon-holders, and share-holders should have no claim upon the company at law or in equity, in respect of the bonds, coupons, or shares, or any proceedings had thereon, except for the conversion of the same into such new stock at the respective rates in the Act provided, and that the company should at the request of such ordinary bond-holders, coupon-holders, or share-holders, or any of them, and upon surrender of the bonds or shares, certificates or other evidence of such holding or claim thereto, issue to all and every such holders or holder of certificates of proprietorship of fully paid-up shares in the new stock proportionate to the amount of bonds, coupons, or shares so respectively surrendered at the respective rates of commission, such new shares being free from all calls in respect thereof.

The plaintiff then refers to and relies on certain provisions of the Act of the Parliament of the Dominion of Canada, 41 Vic. cap. 36, which provides amongst other things for the amalgamation of the Brockville and Ottawa and Canada Central companies, for the allotment of the stock of the amalgamated company to the stockholders of the two companies, and for the liability of the amalgamated company for all the debts, duties, and obligations of both the amalgamated companies, and the plaintiff alleges that shortly after the passing of the Act the two companies were amalgamated under the name of the Canada Central Railway Company, in the manner provided by and subject to all the terms and provisions of the Act.

The plaintiff then refers to and places reliance upon the Act of the Parliament of the Dominion, 44 Vic., c. 1, "An Act respecting the Canadian Pacific Railway," whereby it is amongst other things enacted that that Company might purchase, or acquire by lease or otherwise, and hold and operate the Canada Central Railway Company, or might amalgamate therewith. The allegations respecting this Company need not, I think, be further referred to here, on account of an admission made and put in at the trial, which will appear hereafter.

The plaintiff then alleges that at the time of the passing of the Act of the Legislature of Ontario 31 Vic. c. 44, before mentioned, he was in respect of the said garnishee order a creditor of the Brockville and Ottawa Railway Company for the sum of \$7,863.09, and that under the provisions of this Act he was entitled to receive fully paid up stock in the capital stock of the company to the amount of \$1,965.77, being twenty-five cents in the dollar on the amount of his his said claim, but that such stock or any part thereof was never received by or issued to him, the plaintiff: that he has never been paid or realized any sum whatever in respect of his said judgment debt, nor in respect of the said garnishee order, and that he has always been and now is entitled to all moneys, stocks, bonds, or securities, payable or receivable in respect of the said judgment and garnishee order respectively: that he has applied to each of the defendant companies for the issue to him of certificates of the said stock to which he is so entitled, but the said companies have refused to issue the same or to pay him his said claim and he claims the said stock to the amount of \$1,965.77, with interest thereon from the 4th day of March, 1868, or payment in money by the defendants, of the same sum, and damages for the non-delivery of the stock, and he asks that the defendants or either of them may be ordered to pay his claim, or to issue to him certificates of the said stock to the amount of his claim, and he asks for the issue of a writ of mandamus and costs of the action.

The admission above referred to is as follows:—

“It is hereby admitted that the above mentioned defendants, the Canadian Pacific Railway Company, for the purposes of this suit and for such purposes only,—that under the powers and authority of the Act referred to in the nineteenth paragraph of the plaintiff’s statement of claim, the Canadian Pacific Railway Company amalgamated with the Canada Central Railway Company, and that any liability of the Canada Central Railway Company enforceable against it at the close of the said amalgamation, the Canadian Pacific Railway Company are liable for and will pay on the same being established.”

The plaintiff, in support of his case, proposed to put in as evidence a copy of an order and a copy of a writ of execution. These were objected to as not being evidence. The witness Clarke (b), however, testified that he had made these copies from the respective originals. He was a witness well versed in matters of this kind. He said the originals had been once before lost but were found, and that he had made these copies from them, upon a request of one of the parties to this suit, that the originals were again lost, and he said the only way that he could account for this was that they, when out of the vault of the Common Pleas office, and on the table or desk for the purpose of having the copies made got amongst papers of a wrong bundle, and were in that way put into a wrong file in the vault. I was satisfied from the evidence that the originals were in the office, but after search could not be found, and that it would be useless to search elsewhere for them. They were papers that belonged in that office, for the original order would be filed on the issue of the writ of *fieri facias*, and the original *fieri facias* would be filed on the issue of an *alias*, and it was alleged that an *alias* must have been issued. I admitted these copies in evidence as proof of the originals.

The copy of the order was as follows :

“IN THE COMMON PLEAS.

“John Wardrope, judgment creditor.

v.

“William Sykes, judgment debtor,

and

“The Brockville and Ottawa Railway Company, garnishees.

“Upon hearing the attorney or agent of the judgment creditor, and reading the affidavits of service hereof, and the order made herein on the second day of May, A.D. 1862, whereby it was ordered that all debts owing or accruing

(b) This was Mr. S. B. Clarke, who was at the time an official in the Common Pleas.

due from the said garnishee to the judgment debtor, or to the firm of Sykes, DeBergen & Company be attached to answer a judgment recovered against the said judgment debtor by the said judgment creditor in this Honourable Court on the eighth day of April, in the year of our Lord one thousand eight hundred and sixty-two, for the sum of thirteen hundred and ninety-six pounds and nine shillings, and which said judgment remains unpaid, and no cause being shewn, I do order that the said garnishees do forthwith pay to the said judgment creditor the debt due from them to the said judgment debtor, or to the firm of Sykes, DeBergen & Company, or so much thereof as may be sufficient to satisfy the judgment debt, and that in default thereof execution may issue for the same.

(Sgd.) W. B. RICHARDS.

"Dated the 13th May, A.D. 1862."

This is marked "Order (as amended)" and marked "Filed January 27th, 1864, L. Heyden."

From the copy of the *feri facias* it appears to have been issued pursuant to the order of the 13th of May, 1862, of Mr. Justice Richards, and to be tested on the 23rd day of May, 1862. It is marked "Received in the Sheriff's office, Brockville, 28th May, 1862," and has endorsed upon it a certificate of return *nulla bona* without any date.

An exemplification of the roll of the judgment against Sykes in favour of the plaintiff is put in. The order, of which the above is a copy, seems, from looking at the postea, to have taken the date and amount of the verdict, instead of the date and amount of the judgment, and the *feri facias* follows the order and not the judgment.

After an objection, and some discussion, I admitted, subject to the objection, a memorandum or entry found in the book in the office of the sheriff of Brockville, which appears to be a memorandum or entry of the receipt of the writ by the sheriff. The sheriff is dead, and the deputy-sheriff in whose hand-writing this entry is, is also dead. The present deputy-sheriff proved the handwriting and the place from which the book was produced.

There was much discussion as to these papers and as to how much and how little they proved, even if they were

properly received in evidence. Some of them are certainly subject to remark ; but in the view that I have taken of what appears to me to be the really important point in the case, a decision one way or the other in regard to them would be of no consequence. I think there was not proof of the service of the attaching order. The statement on the face of the order of the 13th of May, 1862, a copy of which is above, does not, as I understand it, mention the service of the attaching order which is really the order that binds the debt in the hands of the garnishee.

There does not appear to be proof of the summons that usually accompanies the attaching order, or the service of it. There was before me nothing that I could consider proof of the existence of a debt from the Brockville and Ottawa Company to Sykes, except that the order of the 13th of May, 1862, assumed that such was the fact.

But for the reason above stated, I do not consider these material for the purpose of the present decision.

Sec. 10, of 27 Vic. c. 57, D., above referred to authorizes the issue to all *creditors* holding *bond fide* claims against the company * * of the scrip in exchange therefor.

The plaintiff alleges that he was at the time of the passing of this Act (the 15th of October, 1863), a creditor of the Company in respect of the garnishee order. It was not pretended that he was a creditor holding a *bond fide* claim against the Company in any other way, and there was much contention at the Bar as to whether or not he was such creditor, even assuming it to have been conclusively proved that everything had been done that was necessary to be done by him against the garnishee, and assuming the existence of a debt owing or accruing due from the garnishee to the judgment debtor, and it was not contended that the plaintiff could succeed unless he showed that he was such creditor of the company.

The language of Lord Campbell, C. J., in *Holmes v. Tutton*, 5 Ell. and Bl. 65, indicates to me that that learned Judge was of the opinion that the judgment creditor did not become a creditor of the garnishee by service of the

binding order upon him, or by the issue of the *fieri facias*. The language of the late Chief Justice McLean, in *Sykes v. The Brockville and Ottawa R. W. Co.*, 22 U. C. R. 459, indicates that that learned Judge was of the same opinion. The language of the late Mr. Justice Burns, in the case of *McGinnis v. The Corporation of Yorkville*, 21 U. C. R. at pages 171 and 172 indicates that he was also of the same opinion, although in none of these cases was the point expressly decided, nor was it necessary that it should be.

In *Drake on Attachment*, 5th ed., sec. 451a, it is said: "Throughout the United States a garnishment is purely a statutory proceeding, and cannot be pushed in its operation beyond the statutory authority under which it is resorted to," and at sec. 451b.: "Garnishment rests wholly upon judicial process, and depends upon the due pursuit of the steps prescribed by law for its prosecution," and at sec. 458: "When the attachment plaintiff seeks to avail himself of the rights of the defendant against the garnishee, his recourse against the latter must of necessity be limited by the extent of the garnishee's liability to the defendant," and at sec. 459, "The plaintiff's right to hold a garnishee, exists only so long as in the suit in which the garnishment takes place, he has a right to enforce his claim against the defendant. When his remedy against the latter is at an end, so is his recourse against the garnishee." And at sec. 459a, "The dissolution of the attachment operates a discharge of the garnishee, though the suit as a personal action be allowed to proceed."

All of which seems to me to indicate that there is not the existence of a debt from the garnishee to the attaching creditor. He has the right against the garnishee that is expressly given him by the statute and nothing more, and although the garnishee can be compelled to pay the attaching creditor if the course pointed out by the statute is pursued, the position of the garnishee is not that of a debtor to the attaching creditor. He continues to be a debtor to his own creditor until he has paid into Court, or to the attaching creditor, after order so to pay, or a

levy of the amount has been made of his property when he ceases to be a debtor as to the amount paid or levied.

I am indebted to the Chancellor for a reference to the case of *Ex parte Chinery*, before the Court of Appeal, in England, noted in the *Solicitor's Journal* for March 16th, 1884, (vol. 8) p. 327 (c), in which the question arose as to whether or not a garnishee order absolute is a final judgment against the garnishee within the meaning of sub-sec. 1g of sec. 4 of the Bankruptcy Act of 1883, and it was held that it was not. The short note of the case there indicates plainly, I think, that the opinion of the Court was, that the garnishee was not a debtor to the attaching creditor.

There were many other parts of the case very pointedly argued, and difficulties apart from this one in the way of the plaintiff, pointed out. Some or many of which may have been insuperable, but being of the opinion that the plaintiff was not a creditor of the Brockville and Ottawa Railway Company, holding a *bond fide* claim against them within the meaning of the 10th section of 27 Vic., cap. 57, D., if his garnishee proceedings were shown to have been in all respects regular and not liable to objection, and that unless he was such creditor he cannot succeed, I do not think it necessary to follow out all the arguments on the other parts of the case.

For the reasons I have endeavoured to give I am of the opinion that the plaintiff cannot recover, and that the action should be dismissed, with costs.

It also appears to me that the suit is defective for want of a party, but for the purpose of dismissing the action that cannot make any difference.

Action dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE MUNICIPAL CORPORATION OF THE CITY OF ST. THOMAS
V. THE CREDIT VALLEY RAILWAY COMPANY.

Railways—Agreement to run trains—Impossibility of performance—Specific performance—Breach.

The defendants covenanted by deed with the plaintiffs, for valuable consideration, that all their passenger trains should run to and from a small station in C. street, in the city of S., for the purpose of checking baggage, and of accommodating passengers. For about a year they ran the trains pursuant to their covenant, but subsequently ceased to do so. It appeared that in order to continue to perform the contract the defendants would either have to obtain running powers from the C. S. R. Company, who owned the station in C. street, or else to build a new line for a considerable distance, involving great expense and difficulty, the crossing of two railways, and the doing of such continuous daily acts as are usually done at a railway station for passengers.

Held, that there had been a breach of the agreement.

Held, however, that, under the above circumstances, specific performance could not be granted, and the plaintiffs must be left to their remedy in damages.

Lytton v. The Great Northern R. W. Co., 2 K. & J. 394; and *Wallace v. The Great Western R. W. Co.*, 3 A. R. 44, distinguished.

THIS was an action brought by the above-named plaintiffs against the above-named defendants, claiming specific performance of a certain agreement entered into by the defendants with them, damages for breach of the agreement, and general relief.

The circumstances of the case are set out in the judgment.

The action was tried on May 28th and June 1st, 1883, before Ferguson, J., at Toronto.

D. McCarthy, Q. C., and *T. S. Plumb*, for the plaintiffs. We claim specific performance. It will not rest with the Court to superintend the traffic or use of the road. If the Court compels the defendants to construct the road, the public will attend to the rest. No adequate compensation by damages is possible. Though it may not be impossible to assess damages, it will be impossible to assess damages to meet the case or such as will do justice to the people in the west part of the city. The law pro-

vides for the maintenance and uses of the road. There can be no difficulty in decreeing that the defendants provide the means of running the passenger cars as provided in the agreement. If it is necessary to ascertain what is required to carry out the contract, the Court will grant an enquiry. We ask, therefore, specific performance of the contract, and a reference as to past damages, and failing that, a reference as to the amount of damages in place of specific performance. We refer to the following cases: *Hood v. North Eastern R. W. Co.*, 8 Eq. 666, S. C. in App., 5 Ch. 525; *The South Wales R. W. Co. v. Wythes*, 1 K. & J. 186, S. C. in App., 5 DeG. M. & G. 880; *Greene v. West Cheshire R. W. Co.*, 13 Eq. 44; *Storer v. Great Western R. W. Co.*, 2 Y. & C. C. C. 48; *Price v. Mayor of Penzance*, 4 Ha. 506; *Saunderson v. Cocker-mouth and Workington R. W. Co.*, 11 Beav. 497; *Lytton v. The Great Northern R. W. Co.*, 2 K. & J. 394; *Fry on Spec. Perf.*, 2nd ed. p. 39; *Raphael v. Thames Valley R. W. Co.*, 2 Eq. 37, S. C. in App., 2 Ch. 147; *Wilson v. Furness R. W. Co.*, 9 Eq. 28; *Firth v. Midland R. W. Co.*, 20 Eq. 100; *Churchill v. Salisbury and Dorset R. W. Co.*, 32 L. T. N. S. 216; *Corporation of the Township of Wallace v. Great Western R. W. Co.*, 25 Gr. 86, S. C. in App., 3 A. R. 44; *Attorney-General v. Mid Kent R. W. Co.*, 3 Ch. 100; *The Great Northern R. W. Co. v. The Manchester, &c., R. W. Co.*, 5 DeG. & S. 138; *Hodge on Railw.*, 6th ed., pp. 41-42; *The Llanelly Railway and Dock Co. v. London and North Western R. W. Co.*, 8 Ch. 942, S. C. in App., 7 H. L. 550; *Whitehouse v. The Liverpool Gas Co.*, 5 C. B. 798; *Colton v. Rookledge*, 19 Gr. 121.

C. Robinson, Q.C., James Bethune, Q.C., and G. T. Blackstock, for the defendants. No case can be found where a company has been ordered to build a railway to run their trains upon, or to run their trains upon a road. The Court will not decree that which cannot be done, or what cannot be effectuated. The defendants have no power to cross the Canada Southern Railway, or the Port Stanley

Railway double track. Either running powers must be got or a new line must be built. That the railway will not be decreed to procure running powers, we have direct authority; and there is no case ordering the building of a railway. Again, the Court will not decree the doing of daily acts, which running trains along a railway involve. A part only of the contract cannot be ordered to be done; either the whole must be ordered to be done or none. Moreover for specific performance there must be certainty in the contract, but here there is absolute uncertainty, (1) as to the meaning of the contract; (2) as to the kind of road required to be built; (3) as to whether both parties understood the contract alike. Again, to carry out the contract as claimed by the plaintiffs, the establishment of ticket offices, the checking of baggage, the despatching of trains are impliedly necessary, and there has never been a decree for the performance of an implied contract: *Attorney-General v. Mid Kent R. W. Co.*, 3 Ch. 100, was not an action for specific performance: it was to compel obedience to the statute—nothing more. *Storer v. Great Western R. W. Co.*, 2 Y. & C. C. 48, involved the simple matter of constructing an arch. In *Greene v. Great Western R. W. Co.*, 13 Eq. 44, there was no uncertainty, the work there was to be done according to a designated plan. *Hood v. North Eastern R. W. Co.*, 8 Eq. 666, S. C. in App. 5 Ch. 525, and *Churchill v. Salisbury and Dorset R. W. Co.*, 32 L. T. N. S. 216, are the only ones relied on for causing work to be done. We refer to *Waterman* on Spec. Perf., sec. 26, 27, 28; *Pierce* on the Law of Railroads, p. 255 n.; *In re Bronson v. Corporation of the City of Ottawa*, 1 O. R. 415; *Powell Duffryn Steam Coal Co. v. Taff Vale R. W. Co.*, 9 Ch. 331; *Blackett v. Bates*, 1 Ch. 117; *Fry* on Spec. Perf., 2nd ed., p. 37, 38; *Johnson v. The Montreal, &c., R. W. Co.*, 22 Gr. 290; *Danforth v. The Philadelphia R. W. Co.*, 18 Am. R. W. Rep. 66, from 30 N. J. Eq. 12; 42 Vic. ch. 9, sec. 48 D.

D. McCarthy, Q. C., in reply. The difficulties set up as to performance of the contract, as to having to go to the Privy Council under 42 Vic. ch. 9, sec. 48, D., the crossing the Canada Southern Railway, and so on, are only quibbles, not sufficiently important to be set up in the pleadings, and only thought of for the first time during the argument, without any warning to the plaintiffs. I refer to *Wilson v. Furness R. W. Co.*, 9 Eq. 28.

March 24th, 1884. FERGUSON, J.—The plaintiffs allege the passing of their By-Law number 176, the contents of which sufficiently appear in the agreement hereafter referred to, and state that by indenture, bearing date the sixth day of September, 1881, the defendants, under their corporate seal, covenanted and agreed with the plaintiffs as follows :

“Whereas the Municipal Council of the City of St. Thomas, by their By-law number 176, ratified by a vote of the qualified electors of said town, pursuant to the provisions of the Act respecting municipal institutions, granted a bonus of fifty thousand dollars in debentures of the said municipality to assist the said company in constructing their line of railway from Ingersoll to St. Thomas.

“And whereas it was in and by the said By-law, amongst other things provided as follows :—That the debentures to be signed and issued as aforesaid shall be delivered by the mayor of the said Town of St. Thomas, to the trustees appointed in accordance with the provisions of the Act incorporating the said Credit Valley Railway Company ; provided always that the said debentures shall not be delivered to the trustees appointed under the said Act until an Act be passed by the Legislative Assembly of the Province of Ontario, incorporating the said Town of St. Thomas as a city, extending the limits thereof, equalizing the taxation in the several wards thereof, changing the limits and number of the said wards, and providing for the extension of the water-works system by laying a main pipe along Talbot Street, notice of which Act has been given in the *Ontario Gazette* ; and until the said company shall have given a bond to the corporation providing that the said railway shall run from the Town of Ingersoll to the Canada Southern Railway at some point not more than half a mile east of the present passenger station on the Canada Southern Railway in the said Town of St. Thomas, and that all the passenger trains of the said Credit Valley Railway Company shall run to and from a small station on Church Street regularly for the purpose of checking baggage and of accommodating passengers ; and provided further that the said trustees shall retain the said debentures when delivered to them, or the

proceeds thereof upon the trusts imposed by the Act of Incorporation of the said Credit Valley Railway Company, and until the line of railways is constructed between the Town of Ingersoll and the Town of St. Thomas, and an engine and train run over the road.

“ And whereas the said Act incorporating the said Town of St. Thomas as a City, and making other provisions as aforesaid, has been duly passed by the Legislative Assembly of the Province of Ontario ; and whereas the said company has applied to have said debentures issued and delivered to the said trustees, and it has become necessary that this bond or covenant should be duly executed and delivered to the corporation of the City of St. Thomas by the said company.

“ Now, therefore, this indenture witnesseth that in consideration of the premises and of the delivery by the said corporation of the said debentures as aforesaid, the said the Credit Valley Railway Company, do covenant, promise, and agree to and with the corporation of the City of St. Thomas, that their railway will run from the Town of Ingersoll to the Canada Southern Railway, at some point not more than half a mile east of the present passenger station of the Canada Southern Railway, in St. Thomas aforesaid ; and all the passenger trains of the said Credit Valley Railway Company will run to and from a small station on Church street, regularly after the said railway shall have been opened for traffic for the purpose of checking baggage and the accommodation of passengers.”

This document was duly executed by the defendants. The debentures were delivered. The defendants built their railway from Ingersoll to the Canada Southern Railway, at a point not more than half a mile east of the passenger station of that railway, in pursuance of their covenant so to do, and commenced and for some time continued to run all their passenger trains to and from the small station on Church street regularly after the opening of their railway for traffic for the purpose of checking baggage and the accommodation of passengers, as provided by the agreement. Subsequently, however, and in or about the month of August, 1882, the defendants ceased, and have since discontinued to run all or any of the passenger trains to or from the station on Church street, and by reason of this discontinuance the plaintiffs say that they have suffered great loss and damage. They say that they were only induced by the consideration of the running of the defendants' trains as covenanted and agreed by the aforesaid indenture to grant to the defendants the said bonus, and without this consideration they would not have

granted it; that they have applied to the defendants and requested them to observe and perform their agreement by running all their passenger trains to and from the station on Church street; but the defendants wholly neglected and refused, and still wholly neglect so to do, and the plaintiffs ask that the defendants should be ordered to run all their passenger trains to and from this station on Church street, from and to their line running from Ingersoll to the Canada Southern Railway, at the point not more than half a mile east of the present passenger station of the Canada Southern Railway in St. Thomas, for the purposes mentioned in the agreement. They claim large damages, and ask for general relief.

The defendants admit the alleged agreement, and say that the station referred to as "the small station on Church Street" was at and before the making of the agreement and now is the property of the Canada Southern Railway Company, and was not then and is not now accessible to the locomotives or trains of any other railway company except over and along the main track of the Canada Southern Railway Company running from their principal passenger station westward, nor without the consent of that company: that prior to the making of the said agreement an agreement had been made between the defendants and the Canada Southern Railway Company, whereby the defendants were authorized and permitted to unite their railway with the Canada Southern Company at their present point of union, and whereby the defendants were also authorized temporarily to run all their passenger trains along the track of the Canada Southern Company from the point of union to the passenger station of the Canada Southern Company and from thence westward to the small station on Church Street, and that the plaintiffs were at and before the making of the agreement between them and the defendants, and at and before the time of the granting of the bonus, fully aware of the precise nature of the agreement or arrangement existing between the defendants and the Canada Southern Company, and knew that

this agreement or arrangement was not of a permanent character so far as the privilege of the defendants to run their trains or to use the Church Street station was concerned, and that the Canada Southern Company might put an end to this privilege at any time and amongst other things say that the plaintiffs were also then aware that the Church Street station was the property of the Canada Southern Company, and was built upon their land, and could only be approached by running along their track: and the defendants endeavour to make out that the agreement relied on by the plaintiffs to run the trains to and from the Church Street station was subject to the running of such trains being stopped by the Canada Southern Company at any time, and that they, the defendants, were to be excused from their obligation to run their trains to the Church Street station in case the Canada Southern Company should at any time withhold their consent, and the defendants claim that if necessary the agreement with the plaintiffs should be reformed accordingly. The defendants then say that the Canada Southern Company notified them that they would not any longer permit them (the defendants) to use the Church Street station, or to have running powers over their track as the approach thereto, and that the Canada Southern Company have absolutely refused to give them the use of the Church Street station or such running power. And the defendants claim that they should not be ordered specifically to perform their agreement or to pay damages for the non-performance thereof.

The plaintiffs by a replication substantially deny what is alleged by the defendants as a reason for a reformation of the agreement or for its being interpreted as the defendants' contend for, or that it or any part of it was subject to any arrangement between the defendants and the Canada Southern Company.

The difference between the parties appears to arise solely in respect of the part of the agreement in relation to the running of the passenger trains to and from the Church Street station.

At the trial, the agreement being admitted, it was also admitted that the defendants did run their trains to and from this station, as required by the agreement, for a period of about one year, and that they then ceased so to do. It was contended for the plaintiffs that the defendants so ceasing to run the trains was a breach of the agreement. For the defendants it was contended that this was not under the circumstances a breach of the agreement, and after argument of the matter, I was asked to decide it, which I did in a short judgment. This decision was one in the affirmative, I being of the opinion that a breach of the agreement was shown (a).

The defence then called and examined a number of witnesses, and closed their evidence. Owing to some remarks that fell from the plaintiffs' counsel in the early part of the trial it seemed to have been understood that the plaintiffs did not really seek to have a specific performance of the agreement ordered. But he (plaintiffs' counsel) now said that he would claim a specific performance, and he called the attention of counsel for the defence to this, saying that it would perhaps be necessary for them to give

(a) On this point counsel for the defendants argued that to bind the railway to continue running their trains, the agreement should have been one binding them to return the money when they ceased to run the trains; that no power can compel a railway to run trains on a railroad, supposing it not to pay, for example: that the plaintiffs knew the defendants could not continue to run their trains without the consent of the Canada Southern Railway, and had received the substantial consideration for their contract: that this was really a case where the subject matter of the contract had ceased to exist: and cited *Jessup v. The Grand Trunk R. W. Co.*, 28 Gr. 583, 7 A. R. 128; *Geauyeau v. The Great Western R. W. Co.*, 3 A. R. 412; *Jackson v. Jackson*, 7 Gr. 114; *Schliehauf v. The Canada Southern R. W. Co.*, 28 Gr. 236.

Counsel for the plaintiff cited *Wilson v. Northampton and Banbury Junction R. W. Co.*, 9 Chy. 279; *Hood v. The North-Eastern R. W. Co.*, 8 Eq. 666, 5 Chy. 525; *The Corporation of the Township of Wallace v. Great Western R. W. Co.*, 25 Gr. 86; 3 A. R. 44.

FERGUSON, J.—[After stating that the question was, whether the fact that the defendants did stop running their passenger trains to Church Street, after having done so for, say, one year, and nothing more being shewn—whether this fact constituted a breach of the contract sued on.]

some further evidence, but that he did not want to give any more evidence on behalf of the plaintiffs.

The defendants' counsel then said, that owing to his understanding that a specific performance was not to be asked by the plaintiffs, he did not examine his witnesses after the manner in which he would otherwise have done, and that they or some of them had gone away. The argument then took place on the understanding that if I should be of the opinion that the agreement, that is, the part of it that was the subject of contention as before mentioned, was such that specific performance of it could or should be ordered, the defendants were to have an opportunity of giving further evidence before judgment, but if I were of the opinion that this part of the agreement could not be ordered to be specifically performed such additional evidence would of course be unnecessary. The plaintiffs' counsel said he could not ask for any judgment or decree but one following the words of the contract, that the defendants should run all the passenger trains to and from the station at Church Street, for the purpose of checking baggage and the accommodation of passengers, and he con-

The part of the covenant of the defendants as to which the contention is, is in these words: "And all the passenger trains of the said Credit Valley Railway Company will run to and from a small station on Church Street regularly after the said railway shall have been opened for traffic, for the purpose of checking baggage and the accommodation of passengers." It is not denied that the defendants are running passenger trains. I have (as there chanced to be some leisure for so doing) examined the authorities referred to, and considered as well as I have been able, the arguments of counsel. I have also examined some authorities regarding *difficulty, inconvenience* and *impracticability* arising out of circumstances merely relative to the promisor, in relation to the performance of contracts, and the valid excuses for not performing them, also some of those relating to impossibilities, both *objective* and *subjective*, as well as to the position of the promisor who chooses to make himself answerable for the acts or conduct of third parties, though beyond his control, and cases where the performance of the contract depends on the existence of a specific thing, as well as those where the subject matter is destroyed without fault on either side, and I am of the opinion that if nothing further is shewn, it must be considered that there has been a breach of contract sued on, and my answer to the foregoing question is in the affirmative."

tended that the case *Lytton v. The Great Northern R. W. Co.*, 2 K & J. 394, was a case in point in his favour. The contract in that case was that the railway company should make, form, and construct, and thereafter maintain, so long as the same should be a convenience, a siding connected with their railway at B., together with all necessary approaches thereto, for the reception and delivery of goods wares, and merchandise, and other matters and things to and from the surrounding neighbourhood, including the tenants upon the estate.

Sir W. Page Wood, in giving judgment, said: "The first question is, whether this is an agreement of which this Court has jurisdiction to direct specific performance. The plaintiff would have thrown some difficulty in his own way on this point if I had adopted his construction of the agreement. I cannot, however, do so. He suggests that he is entitled not only to have the material things mentioned in the agreement provided, but also to have all accessory conveniences, as sheds, and a man to wait at the siding. * * But the bill asks that the company may be decreed to place there a servant of their own to attend and receive the goods; and I should have had great difficulty in enforcing such an obligation as that for all time against the company, supposing it to be contemplated by the contract. But the words refer to a material thing only." Further on the learned Judge says: "The plaintiff claims to have sheds, and one of the company's porters constantly in attendance. As to these I see nothing in the agreement, and if there were any such stipulation as the last it would be difficult to decree a specific performance of it." In that case the work that was contracted to be done was ordered to be performed and nothing more, and when one considers what the running of the passenger trains in this case for the purposes stated involves, I do not think that that case is any authority at all for ordering what the plaintiffs ask.

The plaintiffs also relied upon the case *The Corporation of the Township of Wallace v. The Great Western R. W. Co.*, 3 A. R. 44. There the station had been built accord-

ing to the contract, and the question was, whether the mere erection of the station building was a performance of the agreement. It was held that it was not, and the order was as to stopping trains at the station. I cannot but think that case materially different from the present case, and not an authority for what the plaintiffs ask. Nor do I think the case *Colton v. Rookledge*, 19 Gr., 121, also relied on, is authority for what the plaintiffs ask.

For the defendants it was stated at the bar that there was no case in which a company had been ordered to build a railway or to run their trains upon one already built, and I have not found what I consider to be such a case. From the circumstances that appear it is, I think, beyond doubt that in order to perform what is asked by the plaintiffs either running powers would have to be obtained from the Canada Southern Railway Company or a new line of road built by the defendants for a considerable distance, and at a very great expense indeed, and would involve the crossing of two other railways. It would also involve the keeping of servants and the doing of continuous daily acts, such as the providing and selling of tickets, providing checks for baggage, and the doing continuously of all those things that are usually done at a railway passenger station. The case *Powell Duffryn Steam Coal Co. v. Taff Vale R. W. Co.*, 9 Ch. 331, seems to show that in such a case the Court should not interfere by injunction. That was a case under the Railway Clauses Act, 1845, and Lord Justice James says at page 335: "Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labour and care, the Court has never found its way to do this by injunction." It appears to me that the case *Blackett v. Bates*, 1 Ch. 117, and many other cases of the same character are against the plaintiffs' contention.

The matter to be determined is not at all free from difficulty. After, however, having examined a large number of cases on the subject, and giving it the best consideration I can, I am of the opinion that the specific performance

asked for by the plaintiffs cannot be granted, and that the plaintiffs must be left to obtain such damages as they may be able to show they have sustained by reason of the breach of the agreement that has been before mentioned.

The reference will be to the Master at St. Thomas. The costs of the suit will be reserved till after the report. Further directions also reserved.

A. H. F. L.

[CHANCERY DIVISION.]

THE PHŒNIX INSURANCE COMPANY OF LONDON ET AL. V.
THE CORPORATION OF THE CITY OF KINGSTON ET AL.

*Municipal law—Taxation of premiums of foreign insurance company—
Agent—Income—Insurance—Assessment—43 Vict. c. 27, O.*

The plaintiff company was a foreign corporation with its head office in England, but carrying on insurance business in Canada, with an agency office at Kingston, Ontario, and the head office for Canada at Montreal. *Held*, that insurance premiums received at Kingston by the agent of the company there, for insurance business transacted through him as such agent, were, under 43 Vict. c. 27, O., assessable at Kingston as taxable income or personal property against the company and its said agent, although the agent paid taxes on his own income, which was partly derived from commissions on the premiums received, and the fact that the premiums, having been previously sent by the agent, after collection, to the head office in Montreal, were not in the municipality of Kingston, when the assessment was made, did not make any difference.

THIS was an action brought by the Phoenix Insurance Company of London, England, and George A. Kirkpatrick, its agent at Kingston, in this Province, against the corporation of the city of Kingston, Lewis Middleton and William Robertson to recover the amount of certain taxes paid by the plaintiffs under protest, together with damages for an alleged wrongful seizure by the defendants, made to enforce such payment, and for an injunction, and costs of suit.

The facts of the case sufficiently appear from the judgment.

The action was tried at the sittings of this Court at Kingston, on May 20th, 1884, before Ferguson, J.

Britton, Q. C., for the plaintiffs. There is nothing in 43 Vic. c. 27, s. 3, to authorize the assessment of these insurance premiums. The mode of assessment pointed out in that Act shews it cannot be meant to apply to income. See also R. S. O. c. 180, secs. 28, 30. If the assessment in question here is right, the various offices of Ontario companies must be assessed in the same manner. Suppose the premiums were put into the post-office, addressed to the head office in Montreal, or suppose that Mr. Kirkpatrick was merely a travelling agent, would the premiums then be assessable? The word "income" in the interpretation clauses of the Assessment Act, R. S. O. c. 180, s. 2, sub-s. 8, has the same meaning as that attached to it in other parts of that Act, as, *e. g.*, s. 6, sub-s. 15, 22; also ss. 7, 28; and if income is not personal property within the meaning of these interpretation clauses, and these apply to 43 Vic. c. 27, the defence has no *locus standi*, because income is not in such a case assessable against an incorporated company. Or it may be held that these interpretation clauses do not apply to 43 Vic. c. 27. What we say is, that the premiums are not "income," and "income" is not personal property under 43 Vic. c. 27. See R. S. O. c. 180, secs. 156, sub-s. 20; *Western of Canada Oil Lands Co. v. Corporation of Enniskillen*, 28 C. P. 1; *Attorney-General v. Scott*, 28 L. T. 302; *Attorney-General v. Alexander*, L. R. 10 Ex. 20; *Webster's Dict.* sub voce "income." The case of *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552, is a different case. There the money was in hand ready for transmission to Scotland, and it was held assessable as personal property.

Walkem, Q. C., for the defendants. So far as the premiums were money in Mr. Kirkpatrick's hands, they would clearly be assessable as "personal property," and the question becomes one merely of account, and is for the Court of Revision. But they could also be assessed

as income. The *North of Scotland Case* determines this. See also *Harr. Mun. Man.*, 4th ed., pp. 663, 782.

Agnew, on the same side. The interpretation clauses of R. S. O. c. 180 do apply to 43 Vic. c. 27. A resident company need not be assessed twice. They could avoid that by a certificate or certificates of assessment or payment. Double assessment is unavoidable and not illegal. The agent's office is, for the purposes in question, the office of the company. As to "income," see *Burroughs on Taxation*, pp. 159, 160-1, 170. The agent is assessed under sec. 34 of R. S. O. c. 180; and the assessment may be sustained as one against him, and so the action must fail.

June 27, 1884. FERGUSON, J.—The plaintiffs, the Phoenix Insurance Company, are a foreign corporation, having their head office, as I understand, in the city of London, England. They carry on the business of Fire Insurance in Canada, and have their head offices for Canada in the city of Montreal.

The plaintiff, Mr. Kirkpatrick, was and is their agent at the city of Kingston, Ontario, and through him as such agent a very considerable business is done. His remuneration is a commission upon the amount of premiums received. The plaintiff company have not any office in the city of Kingston, apart from the law office of the firm of which Mr. Kirkpatrick is the senior member. The business of the plaintiff company is done by Mr. Kirkpatrick in the law office of his firm, and the amount of the premiums received during the month, after deducting his commission therefrom is, at the end of each month, transmitted by him to the head office in Montreal.

The defendants, the corporation of the city of Kingston, assessed both plaintiffs for \$2,000 for the year 1883, as the amount of taxable income, no doubt meaning the taxable income of the plaintiff's company. The plaintiff, Kirkpatrick, pays taxes upon his own income, and the commission derived from this business constitutes part of such income. The plaintiffs declined to pay the amount of taxes

claimed upon this assessment, and a warrant was issued and under it a seizure made of personal property of the plaintiff, Mr. Kirkpatrick, and thereupon the amount claimed \$34.82, was paid by him under protest. The defendant Middleton, was the collector of taxes for the corporation of the city of Kingston, and the defendant Robertson was his bailiff.

This action is brought to recover back the moneys so paid, the plaintiffs claiming damages and their costs, and for an injunction restraining the defendants the city of Kingston from collecting taxes for the year 1884 upon an assessment made for this year, in the same manner.

At the trial it was agreed amongst the counsel that the question to be determined should be as follows : " Are the insurance premiums received at Kingston by the plaintiff Kirkpatrick as agent for the plaintiff company at Kingston (the plaintiff company being a foreign corporation whose head office is outside of the province of Ontario) for insurance business transacted through him as such agent, assessable at Kingston as taxable income or personal property against the plaintiff company and the plaintiff Kirkpatrick, its agent, or against the latter as the agent of the plaintiff company, or against either of the plaintiffs."

It was admitted that a seizure was made by the defendants Middleton and Robertson, of property of the plaintiff Kirkpatrick, for alleged taxes for the year 1883. The warrant was admitted and put in, as also the memorandum of property endorsed upon it, and that this property was the property of the plaintiff, Kirkpatrick. It was also admitted that the money, the \$34.82, was paid under pressure and protest, and that the same money was paid over to the corporation of the city of Kingston, with knowledge to them of all the facts.

Very little evidence was given. Mr. H. C. Voyt, the accountant in the office of Messrs. Kirkpatrick & Rogers, was, however, called by the plaintiffs, and he said that the plaintiff company had no other place of business in Kingston: that at the end of each month the premiums

transmitted to Montreal: that there was not on the 1st of October, nor on the 1st of November, 1882, any of the money in the hands of Mr. Kirkpatrick in Kingston: that the losses were paid in Montreal: that no money was advanced by Mr. Kirkpatrick for payment of losses: that the premiums realized are the primary fund out of which the losses are payable, and that the plaintiff company had no real property in Kingston but the premiums; also, that the commission constituted part of the income for which Mr. Kirkpatrick was assessed personally. It was admitted that the money received for premiums was after deducting the commission sent regularly at the end of every month by Mr. Kirkpatrick to the head office for Canada in Montreal. There was, indeed, no other dispute as to the facts.

The questions for determination were argued at great length, and many authorities referred to. Amongst others, it was referred to *Burroughs on Taxation*, p. 160, where it is said, that "annual premiums received by an insurance company constitute part of its income, and when the charter of a city vests in the corporation in general terms, the power of assessment and taxation of all property in the city, such premiums received by the agents residing in the city are not subject to taxation. They are not property, but income."

The case referred to by the author is *Dubuque v. The North-Western Ins. Co.*, 29 Iowa 9. This I have examined. The holding was that the assessment was not valid, but the reason was that the city had only general powers to levy taxes upon all property in the city, and the premiums were not considered to be property but were income. Had there been special powers, such as are given by the Assessment Acts of Ontario in regard to the taxation of income, or by statute law making income personal property for purposes of taxation, the decision must have been the opposite of what it was. For present purposes the case shews that in the opinion of the Court these annual premiums of insurance received by an insurance company are income.

The plaintiffs placed reliance upon the case *The Western of Canada Oil Lands, &c., Co. v. The Corporation of Ennis-killen*, 28 C. P. 1, but that case was decided before the change in the law upon the subject by the passing of 43 Vic. ch. 27, O. At that time the 36th section of 32 Vic. ch. 36, was in force, and it declared that the personal property of an incorporated company should not be assessed against the company, but each shareholder should be assessed for the value of the stock and shares held by him as part of his personal property, unless such stock was exempted by the Act. By 43 Vic. ch. 27, O., it was enacted that the personal property of an incorporated company (other than the companies mentioned as exceptions) shall be assessed against the company in the same manner as if the company were an unincorporated company or partnership.

I think the office of Mr. Kirkpatrick's firm in Kingston must be considered a place of business of the plaintiff company.

It was contended that the words "personal property," occurring in sec. 1, of 43 Vic., O., ch. 27, were not intended to include income, but it appears to me plain that to ascertain the meaning to be attached to these words, one must look at sub-sec. 8, of sec. 2, of ch. 180, R. S. O., which shews what "personal estate" and "personal property" mean, and according to this sub-sec. these words do include income. In other words, I think the interpretation clauses of the Assessment Act, R. S. O., ch. 180, apply to 43 Vic. ch. 27, and after having examined all the authorities referred to by counsel for the plaintiffs, I am of the opinion that these insurance premiums received in Kingston by the plaintiff Kirkpatrick were personal property of the plaintiff company, and sec. 3, of 42 Vic. ch. 27, provides that "All personal property within the Province the owner of which is not resident in the Province, shall be assessable like the personal property of residents, and whether the same is or is not in the possession or control, or in the hands of an agent or a trustee on behalf of the non-resident

owner and all such personal property of non-residents, may be assessed in the owner's name as well as in the name of the agent, trustee, or other person, (if any), who is in possession or control thereof. 2. The property shall be assessable in the municipality in which it may happen to be."

I think both the plaintiffs were properly assessed for this income, and that the assessment for it was properly made in the city of Kingston, and I think the case *In re North of Scotland, &c., Co.*, 31 C. P. 552, an authority for this conclusion.

It was said in argument that this income was not in the municipality when the assessment was made. It is seldom, I think, that the whole income of any person is *intact* in the municipality at the time when he is assessed for it, as personal property under the provisions of the statute. I think the case *Last v. London Assurance Corporation*, 12 Q. B. D. 389, involved considerations that do not arise here, and is distinguishable from the present case. No question was raised, and, as I understood, none was to be raised as to the amount, even if I were in a position to dispose of such a question.

I am of the opinion that the plaintiffs' case fails, and that the action must be dismissed, with costs.

Action dismissed, with costs.

A. H. F. L..

[CHANCERY DIVISION.]

ELLIOTT v. STANLEY ET AL.

Partners—Contract—Sale of business—Joint and several liability—Breach by one covenantor of joint contract not to trade.

S. and H., trading partners, sold out their business to E. under a written agreement, as follows :—"S. & H. do hereby bind themselves to E., under a penalty of \$2,000, that they will not do business in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M.

Held, that this did not amount to a breach of the above agreement, though the matter was not free from doubt.

Seemle, the rule stated in *Rawle on Covenants*, 4th ed., p. 536, that when two persons jointly covenant with another, a joint action lies for the covenantee on a breach of covenant by one of the covenantees only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements in the absence of language imputing such suretyship in regard to future acts or breaches.

THIS was an action brought by Messrs. Elliott and Carter, against George Stanley and James Halliday, alleging that in June, 1883, they bought out the business of the defendants as hardware merchants in the village of Chesley, on the agreement and understanding that the defendants should give up their business and the good will thereof, and would relinquish the carrying on of the business of hardware merchants at Chesley for five years, either individually or in partnership, and pursuant to such agreement the following written agreement was entered into between them on June 18th, 1883 :

Bargain and agreement between Stanley and Halliday of the first part, and J. H. Elliott and H. V. Carter of the second part, the parties of the first part agree to sell to the parties of the second part their hardware stock and business, and do hereby bind themselves to the parties of the second part under a penalty of \$2,000 that they will not do business in the village of Chesley in hardware, tinware, or stoves for the term of five years from this date. The parties of the first part agree to let the parties of the second part have the use of their shop and fixtures till such time as the new shop now being erected is finished, on or about the 1st day of November, for which the parties of the second part are to pay the sum of \$50. If the parties of the first part break the above agreement they shall

forfeit and pay the above amount to the parties of the second part, otherwise the above shall be null and void.

Signed, sealed, and delivered in presence of
(Signed) R. HALLIDAY, } STANLEY & HALLIDAY.
this 18th day of June, 1883.

That notwithstanding the above sale and agreement the defendant Stanley did, about January 1st, 1884, recommence business in partnership or connection with one McLaggan, in Chesley, as hardware merchant, pretending that under his agreement with the plaintiff he was not debarred from continuing the hardware business in Chesley, individually, or with persons other than Halliday, and that the said agreement only extended to the firm; and the plaintiff claimed \$2,000 and interest from January 1st, 1884, as damages liquidated and agreed upon in the above agreement; or in the alternative, if the Court should hold that the damages were not liquidated, then the plaintiffs claimed \$4,000 damages, and an injunction, and if necessary that the written agreement might be rectified so as to express the true agreement of the parties thereto, and costs of suit.

The defendants by their statement of defence declared that the written agreement above set out was the only agreement, and expressed the true agreement entered into by the defendant Stanley with the plaintiff, and ratified by his partner the defendant Halliday, and submitted that under it, Stanley was not debarred from doing the acts complained of.

The action was tried at Walkerton, on June 5th, 1884, before Boyd, C.

A considerable amount of evidence was given with a view to rectification of the agreement if the same should be necessary to the plaintiff's relief.

Walter A. Cassels, Q. C., and *A. H. F. Lefroy*, for the plaintiffs. We submit there has clearly been a breach of the real agreement entered into between the parties. But so there was, even if we are confined to the written agreement: *Rawle* on Covenants, 4th ed., p. 536; *Cummings*

v. *Little*, 24 Pick. (Mass.) 266; *Platt* on Covenants, p. 117, This being so, the defendant Halliday is liable for his co-defendant's breach, for the agreement is joint and several. As to the damages we say they are liquidated: *Parfitt v. Chambre*, 15 Eq. 36; *Sparrow v. Paris*, 7 H. & N. 594. If not, we are entitled to an injunction and to such damages as we have incurred: *High* on Injunctions, 2nd ed., sec. 1343. Under the sale of their "hardware stock and business" the good will was included: *Hall v. Barrows*, 33 L. J. Ch. N. S. 204; *Harrison v. Gardner*, 2 Madd. 198; *England v. Downs*, 6 Beav. 269; *Shipwright v. Clements*, 19 W. R. 599, and taking into consideration the circumstances of the sale here there has been a breach of the good will: *Labouchere v. Dawson*, 13 Eq. 322; *Leggott v. Barrett*, 15 Ch. D. 306; *Ginesi v. Cooper & Co.*, 14 Ch. D. 596.

Shaw, Q. C., and *Barrett*, for the defendants. The defendants will not be held to be jointly and severally liable, in the case of a prospective covenant such as this: *Lucas v. Beale*, 10 C. B. 739; *Cooke v. Seeley*, 2 Ex. 746; *Baskcomb v. Beckwith*, 8 Eq. 100; *Smith v. Wheatcroft*, 9 Chy. D. 223. At any rate the damages are not liquidated: *Walker v. Moulton*, 19 Ch. D.

At the close of the argument the learned Chancellor held that there was clearly no case for rectification, and the plaintiff must rest upon the construction of the written agreement as to which he reserved judgment.

June 19th, 1884. BOYD, C.—The case of *Comings v. Little*, 24 Pick. 266, cited in *Rawle* on Covenants, 4th ed., p. 536, and relied on by the plaintiff contains this statement of the law: "Where two persons covenant jointly with another, a joint action lies for the covenantee on a breach of covenant by one of the covenantors only, because they are sureties for each other for the due performance of the covenant."

That is I incline to think a proposition which is to be

limited to the case of antecedent breaches, and not to be extended to promissory engagements in the absence of language importing such suretyship in regard to future acts or breaches. This, at all events, was the view of the Judges, in *Coleman v. Sherwyn*, 1 Show. 78. As reported in *Comberbach*, p. 164, Holt, C. J., is of opinion that a covenant which is joint in itself, shall be taken severally when the breach assigned is the separate act of one of the parties. See also the same case more fully on this point reported in *Carthew*, 98-9. In such a case the wrong doer would alone be liable on the joint covenant.

What was aimed at here by the plaintiffs? It was that they should have the business they purchased free from the rivalry and opposition of those from whom they purchased in the same line of trade, and in the same neighbourhood for five years. If the two who sold out had entered upon the same business as constituents of a larger body (*e. g.* a joint stock company carrying on such a business), there would have been a breach unquestionably: *Wright v. Chappell*, 17 W. R. 655. Why should it not be equally a breach if one of the two so engages himself with another partner, as in the present case? In the old case of *Boulter v. Ford*, 1 Keb. 284, S. C., Sid. 76, where two jointly covenanted to build a house, it was said by one of the Judges to be a satisfaction of the covenant if it was done by one only inasmuch as the thing required to be done was done. Why should not the converse of that hold good here inasmuch as the material thing which was not to be done has been done?

These are the cases which go furthest in support of the plaintiffs' contention, nevertheless I cannot satisfy myself that they go far enough to justify me in reading the contract as if it provided against they two, "or either of them" going into the prohibited business. Such would be the proper form of covenant if a joint covenant and a several breach were contemplated: *Wilmer v. Currey*, 2 De G. & Sm. 3. But so to read the writing would be inconsistent with sound precedent, and might well be styled, in Lord

Hardwicke's phrase, an example of "prodigious latitude of construction."

The cases I have just quoted from are ones in which the condition or engagement was such as might be broken by one of the covenantors (*e. g.*, a promise that the plaintiff should have quiet possession which anyone of those bound might invade) but here one could not break the undertaking as expressed: the matter stipulated was, that *they* should not engage in a like business: it contemplated and provided against joint action. It was not merely that a rival trade should not be begun, but that they two, would not be the parties to set up or enter upon such a business.

The chief defendant objected during the negotiations to bind himself individually or personally, and the contract was drawn up by the plaintiffs in its present shape, deliberately so framed as to cover a joint liability only. I found against any attempt to rectify or alter at the close of the trial, and I have now but to consider the legal consequence of this instrument: *Richardson v. Horton*, 6 Beav. 185; *Jones v. Beach*, 2 De G. M. & G. 886; *Clarke v. Bickers*, 14 Sim. 639.

This is essentially an action on the contract set out in the statement of claim, and the complaint is, that there has been a breach of that contract by the wrong doing of one only of the defendants. It is an action for that tort, but based on the contract without which there would be no cause of action, because apart from the contract no duty lay on the defendants to abstain from setting up a rival trade. The contract is in form and substance joint; and the engagement is also joint, that they, the defendants, will not engage in any business such as they have sold as mentioned in the writing. It is a joint contract; what the contractors undertake to abstain from is of a joint nature, and to sustain the action it is necessary to prove a joint wrong doing, which has not been alleged by the plaintiffs or attempted by the defendants. The reasoning of Lord Elleuborough, in *Weall v. King*, 12 East. 452, is not inapplicable to this aspect of the present case. See also *Moul v*

Moul, 29 L. T. N. S. 844. Shortly put, the dilemma of the plaintiff strikes me thus: as regards the one defendant who committed the wrong, there is no sole or several contract which binds him; as regards both defendants, there is no joint breach of the contract to justify a joint recovery.

The action therefore fails, and I suppose costs must follow to the defendants.

A. H. F. L.

This action will not be carried to appeal.

[QUEEN'S BENCH DIVISION.]

STILWELL V. RENNIE ET AL.

Libel—Separation of jury after Judge's charge—Consent of counsel—Delegation of counsel's authority—Possibility of outside influence—Refusal to interfere with verdict.

In an action for libel, after the charge of the Judge the jury were allowed to separate with the consent of the counsel for the plaintiff and for two of the defendants, the counsel for the other defendant P. having left Court before the Judge's charge, but before leaving having authorized F., the counsel for the defendants in the same interest with P., to take on his behalf any objections he might think proper to the charge. Before re-assembling some comments on the case, very prejudicial to the defendant P., were published by the *Mail* newspaper which the jury might have had the opportunity of reading.

On re-assembling the jury found a verdict against the defendant P.

The Court not being satisfied that P.'s counsel, as represented by F., did not assent to the separation of the jury, refused to disturb the verdict.

ACTION for libel published 8th October, 1883.

The defendants Rennie and Knight did not plead.

The defendant Patullo pleaded: 1. That he was not and never was the owner, printer, and publisher, or one of the owners, printers, or publishers of the newspaper known as the *Evening Herald*, as alleged. 2. He denied that he printed or published, or caused to be printed or published,

of and concerning the plaintiff, the words charged in the second paragraph of the statement of claim, the libel complained of.

The action was tried at the last Fall Assizes held at Toronto, before O'Connor, J., and a jury.

After the counsel had addressed the jury and the learned Judge had delivered his charge the jury retired, and returning shortly after stated that they were in favour of defendant Knight, and stood ten to two against defendant Patullo.

On the application of the jury and by consent of Mr. Falconbrige, (who appeared for Rennie and Knight), and of Mr. Delamere (for the plaintiff), Mr. Ball, Q.C., who appeared for the defendant Patullo, having left for home immediately after his address to the jury, the jury were allowed to separate until Monday, when they were to assemble at 11 o'clock and consider as to their verdict.

On Monday Mr. Ball said that he would certainly object to the jury having been allowed to separate: that he had not been present at the close of the charge on Saturday or he would then have objected to that course being adopted. He also called the attention of the Court to what he termed a scandalous article which had appeared in that morning's *Mail*, copies of which, he had no doubt, had been read by some of the jury, and he concluded by submitting that the jury having once separated had finally separated.

The jury were then allowed to retire to consider their verdict. At 11.50 a.m., the jury came into Court, and on being asked if they had come to a decision, the foreman of the jury said that they had decided that Patullo and Rennie were the sole proprietors of the paper at the time of the publication of the article, and they fixed the damages at \$500, and found that the defendant Knight was free from responsibility.

The *Mail* newspaper referred to the case as follows: "The jury retired at a quarter to four, and as several of the jurors urgently required to leave the city by the 4.50 p.m.

train, they were given to twenty minutes past four to agree on a verdict, if possible. Five minutes before the time they returned with the following finding: 'that Knight be wholly exonerated, and that the plaintiff be allowed damages to the amount of \$500.' Ten of the jury were in favour of finding that Patullo and Rennie were the proprietors of the paper, but on this point they could not agree. They were accordingly discharged till this morning, with the usual injunction. The Court then adjourned."

At last Michaelmas Sittings *Ball*, Q.C., obtained for Patullo an order *nisi* calling on the plaintiff, and on Rennie and Knight, to shew cause why the verdict for the plaintiff should not be set aside, and a new trial granted, upon the ground that after the jury had been charged by the learned Judge, and had retired to consider their verdict on Saturday, the 27th of September, they were allowed to depart from the Court and to be at large and separate, and were not in the custody of an officer of the Court, until Monday, the 29th of September; and also upon the ground that there was published in the *Mail* newspaper of the 29th of September an article respecting the matters in question in this cause, and other matters, which the jury while at large had an opportunity of reading, which article was calculated to prejudice the defendant Patullo, and to prejudice the jury against him; and also upon the ground that the learned Judge improperly allowed Edward Knight to state his impression of the result of a conversation between the defendant Patullo and others; and on the ground that the damages were excessive; or why a nonsuit should not be entered, on the ground that the verdict was against evidence.

Delamere shewed cause. There was evidence on which the jury might find that Patullo was the person who had the management and control of the newspaper, and therefore liable for the libel contained in it. He referred to *Folkard*, p. 428; *Odger*, p. 156; *Rex v. Walter*, 3 Esp. 21;

Harrison v. Pearce, 1 F. & F. 567. As to the new trial, on the ground of the separation of the jury, in civil cases and misdemeanours it is discretionary with the Court, and the discretion is never exercised in favour of a new trial, except where there has been some superadded misconduct, which is not the case here. In all cases where a new trial has been granted they can be distinguished from the present on this ground. He cited *Rex v. Kinneear*, 2 B. & Ald. 462; *Rex v. Fowler*, 4 B. & Al. 273; *Coke upon Littleton*, 227; *Morris v. Vivian*, 10 M. & W. 137.

Falconbridge, for Rennie and Knight, supported the motion. He referred to *Parnell v. G. W. R. Co.*, 1 Q. B. D. 636-644; *Marsh v. Isaacs*, 45 L. J. C. P. 605.

Ball, Q.C., for Patullo. No case in point can be found in the Canadian Reports and that fact, together with the invariable practice of the Judges, the oath administered to every constable placed in charge of a jury retiring to consider their verdict, should be sufficient to have the order *nisi* made absolute upon this point. But in England there is an authority in the case of Lord DeLamere, cited in the case of *Rex v. Kinneear et al.*, 2 B. & Ald. 462, from *Howell's State Trials*, vol. 11, p. 559. It is also cited by Richards, C. J., in *Campbell v. Linton*, 27 U. C. R. 563, at p. 568, and is as applicable to civil actions, more particularly to actions like the present one, as to criminal prosecutions. Juries have only been allowed to separate in civil cases and upon the trial of misdemeanors before being charged. The reason why the jury should be kept together until they have delivered their verdict is, that this ought to be founded upon the evidence together with the observations of counsel and the directions of the Judge; whereas, if they separate, their minds may and often will be influenced by what they may hear or read during such separation; and the article in the *Mail* shews the necessity of the jury being kept together. That article undertakes to decide the sole question in issue; that is, whether the defendant Patullo was the proprietor or publisher of the *Herald* newspaper, and not only decided

it adversely to him, but fixed the amount of damages the jury should assess; and upon both points the jury followed the *Mail* newspaper, and therefore it can hardly be assumed by the Court that none of the jury read that article. *O'Mullin v. Bishop et al.*, 20 U. C. R. 275, shews how careful the Court is in this respect. The counsel for defendant Patullo, having left the Court before the jury were allowed to separate, took the objection upon the opening of the Court on Monday, and contended that the separation of the jury amounted to discharging them from finding a verdict, which it is submitted is the result and that a verdict rendered afterwards is of no effect. The authorities clearly shew that where any improper influence exists the Court will set aside the verdict: *Allum v. Boulton*, 9 Ex. 738. See also *Watson v. Gas Light Co.*, 5 U. C. R. 244; *Case v. Benway*, 18 U. C. R. 476. It is also submitted that the learned Judge was wrong in allowing the witness Knight to state his understanding of the result of a conversation; the conversation itself or so much of it as the witness could recollect should have been told by the witness, and the jury alone can draw the inferences. The evidence is not sufficient to prove that defendant Patullo was either the owner, printer, or publisher of the *Herald*, and upon that ground he is entitled to have a verdict entered for him.

January 6, 1885. WILSON, C. J.—Upon the evidence we could not interfere with the verdict, nor with the amount of damages awarded.

Upon the other part of the case, if the jury had been allowed to separate without the consent of Patullo or of his counsel from Saturday afternoon until the following Monday morning after the charge had been given to them by the learned Judge, and after they had retired to consider their verdict, and after they had expressed the result of their deliberation so far as it had gone, that they acquitted Knight, and that they stood ten to two against the defendant Patullo, they could not, against the protest of Patullo's

counsel, be called together again and allowed to continue their deliberation and to deliver a verdict against Patullo.

It happened upon the Monday morning the *Mail* newspaper, in referring to the trial upon the Saturday, made some very strong comments prejudicial to Patullo, and these comments may have been read by or communicated to the jury, or to some of them, as it is a widely circulated paper, and the comments were of that nature that if seen by the jurors they might have brought about that unanimity on the Monday which was not obtainable upon the Saturday.

The verdicts of juries are frequently complained of, but that is after the proceedings have been fairly conducted, and their decision is all that is impeached. But here the complaint is, that the principal safeguard, the verdict rendered shall be the actual verdict of the jury themselves, unaffected by any outside influence, has, it is said, been removed, and each one of them has been at liberty to talk with and be directed or induced by any unknown person, or by some unknown means, to submit his judgment to the arguments of others, or to influences which cannot be discovered; and it may be that a bias has been given to the judgment of the jurors, of which they are not themselves conscious.

The law has provided elaborate means, by the selection and striking of jurors by independent officials, by the balloting for each jury in open Court, and by the unlimited right of challenge for cause, and the limited right of challenge without cause, to secure an impartial jury; and after the administration of the oath, a true verdict to give according to the evidence, there shall be the further safeguard, that the jury shall be kept together, when they retire to consider of their verdict, until they have delivered it, or are discharged because they cannot agree upon it; and we would not enquire whether the jury, or any of them, had been in fact influenced during the time of their separation; it would be sufficient that the protection and security which the suitor is entitled to by law has not been

given to him; and we should have been obliged to set aside the verdict in such a case, and to order a new trial.

We are not, however, satisfied the jury were allowed to separate without the assent of the defendant Patullo, or of his counsel, as represented by Mr. Falconbridge, who was in the same interest, as representing the other defendants, as Mr. Ball, the counsel for Patullo, and who was left in charge, to some extent, of the defendant Patullo's interests by Mr. Ball when he left the Court, before the conclusion of the case upon the Saturday afternoon. Mr. Falconbridge consented to the separation plainly on behalf of his own clients. The extent of Mr. Falconbridge's delegated power he states as follows:

Mr. Ball "told me that he was obliged to leave, or otherwise he could not get home that night, and Mr. Ball requested me to take any objections to the Judge's charge which I thought proper, and asked me to telegraph him the result. Further than as stated above, I was in no sense left in charge of the case for the defendant Patullo nor representing him."

And Mr. Ball states the matter as follows: "I left no person to take charge of the said suit further than as next hereinafter stated. Just before leaving Court I said to Mr. Falconbridge, who was counsel for the other defendants, that he would be in Court until the close of the trial, and if the charge of the learned Judge was in any way objectionable, that he would take such objections as might be necessary in behalf of his own client, and that my client, could get the benefit of them if it became necessary to move, and I asked him to telegraph me the result. The said Falconbridge, when he consented to the separation of the jury, was not authorized to represent me further than as above stated."

I am disposed to think Mr. Falconbridge could, under the power expressly given to him, have done more than take objection to the Judge's charge. He knew the jury would probably adhere to the opinion they had expressed in favour of Knight, one of his clients, on Saturday, and

he knew Rennie, his other client, had no defence, and was unquestionably liable; in fact nobody appeared to know where Rennie then was, and besides that Rennie had no money to pay any amount that might be found against him, and both Mr. Falconbridge and Mr. Ball knew the whole responsibility of the defence rested upon Mr. Ball's client Patullo.

The separation of the jury could not substantially affect Mr. Falconbridge's clients, but it might seriously affect Patullo.

If it had been found the jury could not agree, and before they had expressed in what proportion they stood for or against Patullo, Mr. Falconbridge might have said he would take the findings of eleven of the twelve as the verdict for the whole, but he would not take the findings of any lower number, and I think that Patullo would be held bound by his consent; or if one of the jurors had become too unwell to act longer, he might have consented to the discharge of that one and to take the verdict of the others; or he might have consented to some paper or statement not strictly evidence being taken and considered by the jury; or he might have consented to the jury being allowed to go at large for their dinner, or to be discharged by a certain hour if they did not agree; or that they should give a sealed verdict, and be allowed to separate upon condition of their being called again on Monday to declare whether they adhered to or varied from their verdict. So I think he could have assented to some special arrangement about costs or the like, and in all these cases I think Mr. Ball would have been bound.

It is an unfortunate thing if any injustice has been done in this case, but I do not think there has been.

Upon the whole I am not quite satisfied to disturb the verdict.

We shall discharge the motion, but we think it may very properly be done, without costs.

Motion discharged, without costs.

[QUEEN'S BENCH DIVISION.]

HOWELL V. ARMOUR ET AL.

*Action against justice of peace—Notice of action and statement of claim—
Defect in—Failure of action.*

In an action against a justice of the peace and constable for having issued a search warrant against the plaintiff, for having and concealing a colt belonging to another, *Held*, that the notice of action and statement of claim, being each of them founded upon a cause of action arising in a case in which the justice had jurisdiction, were defective for want of the allegation that the justice acted "maliciously, and without reasonable and probable cause;" and that the statement of claim was defective in not shewing a right to restitution of the property, although the plaintiff was acquitted of any wrongful taking, detention, or concealment of the same.

Held, also, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, the statement of claim not alleging that the property had not been stolen.

THE statement of claim was, that the defendant Armour, a Justice of the Peace, upon the complaint of one Carpenter, upon the 21st of May, 1884, issued his search warrant against the plaintiff, for having and concealing in and upon his premises a grey mare colt, of which he had the possession for two years as his own property, alleging it was stolen from the said Carpenter, commanding that the colt and the body of the plaintiff should be brought before the said Armour, under which warrant Hunter, a constable, took from the plaintiff the said colt.

Armour pleaded not guilty by statute, C. S. U. C. ch. 126.

Hunter pleaded also not guilty by statute, R. S. O. ch. 73.

Issue.

The cause was tried at the last Fall Assizes, held at Brantford, before Rose, J., and a jury.

It appeared that the plaintiff was not taken into custody, but a day was arranged for the hearing of the case by the said Armour, and on the 27th of May, the day appointed,

the plaintiff appeared before Armour, and there and then Armour took the evidence of Carpenter and other witnesses for the Crown, and after hearing the evidence dismissed the case.

Hunter was present at the hearing and had the colt in his custody, and the plaintiff, after being discharged, demanded the colt from Hunter, but he refused to give it up; whereupon the plaintiff, in presence of both defendants, asked Armour to order Hunter to give up the colt to the plaintiff, but Armour refused to do so, alleging he was going to send the colt and the depositions to Brantford. The plaintiff then pointed out that Armour had no power to do anything further in the case, and the plaintiff then again demanded the colt from both the defendants, they being then together, but they both refused to give it up, and they detained the colt, and have ever since deprived the plaintiff of the use and possession of it.

One Hartwell said he was present at the investigation before Armour. Armour said he knew the plaintiff did not steal the colt, and he was not going to try the plaintiff. Mr. Snider, the plaintiff's lawyer, said to Armour, that if he was not going to try the plaintiff the colt was his, and he demanded the colt from Armour, who refused to give it up. He said he thought they would have the thief there in twenty-four hours. After the charge was dismissed the plaintiff and Mr. Snider again demanded the colt from Armour, who said the colt was not in his charge; that it was in the charge of Hunter. The demand was also made on Hunter, who said the colt was in the charge of Armour. Armour also said he would give his decision in four days. Evidence was taken as to the person who was the owner of the colt.

Mr. Snider, the solicitor for the plaintiff, said he appeared with the plaintiff before Armour. Armour said he was not going to try the plaintiff, but to try who the owner of the colt was. "I said you cannot do that."

After the evidence was taken, and the plaintiff discharged, he, Mr. Snider, and the plaintiff asked Mr. Armour

for the colt, who said it was in the constable's hands, and on Hunter being required to give up the colt, he said it was in the magistrate's hands, and he would not give it up without an order from the magistrate, and the magistrate would not give the order. The magistrate said he would send the colt and the depositions to Brantford, and he would decide in four days what he would do with the colt. He was asked to give up the colt at once, and he said he would not do it.

Dr. Howell, the plaintiff, said he got the colt in the summer of 1882, and it was taken from him in May, 1884; bought it from Mr. Craig. "I first heard it was stolen ten or eleven days before it was taken from me; heard it from Vanloan, a white man. He said it was stolen from a Miss Carpenter, a squaw, and he had bought it from her. It was nearly black when I got it, but it had some grey hairs, and it turned out to be nearly an iron gray."

VanLoan claimed the colt before the magistrate; the information was signed by the squaw, Mary Carpenter.

Hartwell, recalled, said that when he served Hunter with the notice of action he said he had given the colt to the squaw, Mary Carpenter.

A good deal of evidence was given as to the identity of the colt the plaintiff had with the one said to have belonged to Mary Carpenter, and which was said to have been stolen from her. The plaintiff, it was said, bought the colt in the summer of 1882 from John Craig, and he proved he bought it from an Indian in November, 1881; and for the plaintiff witnesses were produced who said Mary Carpenter had the colt she owned along with the dam in March, 1882, so that, apparently, her colt could not have been the one Craig had bought in November, 1881.

At the close of the plaintiff's case a nonsuit was moved for on several grounds.

1. There was no joint cause of action against the two defendants.

2. There was no conversion or wrongful refusal to give

up the colt to the plaintiff on the 27th of May, the day in the notice of action specified, and the plaintiff cannot rely upon anything that took place after that day. The magistrate did not act maliciously; he was charged only with exceeding his jurisdiction. The possession of the constable was under the order of the magistrate.

The magistrate had evidence of there having been a larceny of the colt, and he was justified in detaining it until that larceny was enquired into. He was not bound to restore the colt before that to the plaintiff. He was right in giving it to the constable to hold until enquiry could be made about it.

For the defence.

Armour said he told the constable to give the colt to Mary Carpenter, because he thought the colt was her property. That was after the 27th of May.

On cross-examination he said :

"I did not sit to investigate the criminal charge, but to try whose property the colt was, and in my judgment Mary Carpenter was entitled to it, and I told the constable to give it to her, if she paid the costs. My judgment was, that the woman was to get the colt."

Mary Carpenter was called. She said she lost her colt in December, 1881. She got it again last spring. VanLoan brought it to her. It was the one Dr. Howell had. She sold the mare in February, 1882.

A great deal of evidence followed, which rather shewed the colt was the property of Mary Carpenter.

The learned Judge left the following questions to the jury, which they answered :

1. Was the horse in question stolen from Mary Carpenter? A. No.

2. What was the value of the horse? A. \$150.

3. When Armour issued his warrant did he honestly believe he was acting in discharge of his duty as a Justice of the Peace, so as to discover the person who stole Mary Carpenter's colt, or did he issue the warrant for the purpose of taking the horse out of the possession of Dr. Howell, and

giving it to Mary Carpenter, so that she might give it to VanLoan? A. Armour issued his warrant for the purpose of taking the horse from Dr. Howell, and giving it to Mary Carpenter.

4. If he did believe he was acting in the discharge of his duty, had he reasonable grounds for such belief? No answer.

5. Had Armour such belief when he refused to give up the horse, after hearing the evidence? A. He had.

6. Did Armour honestly believe that he was acting in the discharge of his duty as a Justice of the Peace, when he ordered the horse to be given up to Mary Carpenter? A. He did.

7. In either of the two last cases, had he reasonable ground for such belief? A. He had none.

8. Did Hunter, in what he did, honestly believe he was acting in the discharge of his duty as a constable, or was he acting in concert with Armour to take the horse from Dr. Howell and give it to Mary Carpenter? A. Hunter was acting in concert with Armour to take the horse from Howell, and give it to Mary Carpenter.

9. If he did believe he was acting in the discharge of his duty, had he reasonable grounds for such belief? No answer.

10. Did either or both of the informants on the 27th of May, after the evidence closed, refuse to give up the horse to Dr. Howell? A. Both defendants refused to give up the horse to Dr. Howell, when asked after the examination on the 27th of May.

When the answers were brought in the learned Judge said to the jury: "What do you mean by your answer to the third question? The foreman answered: "That Armour did not intend to capture the thief: it was for the purpose of transferring the horse."

The jury were also asked: "How do you think he was acting in the discharge of his duty, when he refused to give up the horse after hearing the evidence?" They answered: "We thought from the evidence, from his

sending to the County Attorney, that he thought he was discharging his duty."

The learned Judge: "And also when he ordered the horse to be given up to Mary Carpenter?" The jury: "Yes, because he had asked for instructions."

The learned Judge: "You mean to say Hunter did not believe he was acting in the discharge of his duty?" The jury: He was not trying to capture the thief."

The learned Judge: "Your idea was, he was acting to determine a civil right rather than to put in execution the criminal law?" The jury: "Yes, between the two parties."

Upon these findings the learned Judge directed judgment to be entered for the plaintiff for \$150, with full costs.

At the last Michaelmas Sittings *VanNorman*, Q. C., for the defendant Armour, obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict and judgment for the plaintiff should not be set aside and a verdict entered for the said defendant, or for a new trial, upon eleven different grounds.

He also gave notice of motion upon several of the same grounds.

V. Mackenzie, Q. C., for Hunter, also obtained an order *nisi* for the same purpose upon ten different grounds, and he also served a notice of motion upon several of the same grounds.

VanNorman, Q. C., supported the motion for the magistrate.

The notice of action states the conversion of the colt to have been on the 27th of May, by the refusal of the magistrate to give it up.

The magistrate is not bound to give up stolen property even when he discharges the party in whose custody the property was found: *Burns's Justice*, Tit. "Search Warrant."

The woman who claimed the stolen property got it from the magistrate; that was after the 27th of May.

If the giving up of the property to the woman was a

conversion, it is not the conversion specified in the notice of action: *Paley* on Convictions, 496; *Addison* on Torts, 463, 5th ed; *Tomlin's Law Dic., Constable*, IV.

Mackenzie, Q. C., for Hunter. Defendants are entitled to a nonsuit, on the ground that the notice of action and the pleadings disclose a cause of action, if any, under the second section of R. S. O. ch. 73, while the evidence at the trial was directed to the establishing of a cause of action under the first section of the Act; and such was the form of action, if any, proved: *Ratt v. Parkinson*, 20 L. J. M. C. 208. The notice of action and pleadings allege further a detention on the 27th of May, a position refuted by the evidence, only a supposed detention, four days later, on the 31st May. Statement and evidence as to time must be specific: *Oliphant v. Leslie*, 24 U. C. R. 398. The pleadings set forth, in addition, a detention in the Township of Onondaga. Even if other requisite proof of a cause of action on the 31st May had been adduced, this averment is not substantiated, the evidence supplying, by unavoidable inference, the fact of the detention, if any, having been in the Township of Tuscarora. In any case the contrary should have appeared affirmatively. Statement and evidence as to place must be equally specific and agree: *Par-kyn v. Staples*, 19 C. P. 240. The magistrate was justified in retaining possession of the colt for the period named, the evidence offered at the preliminary hearing having pointed to a larceny in respect thereof by a person then at large: *Ballard v. Pope*, 3 U. C. R. 317. The position of defendant Hunter has peculiar strength, independently of the defences in which his interests and those of his co-defendant coincide. He was a mere servant of the Court, and could not hesitate or decline to obey its mandate: *Ovens v. Taylor*, 19 C. P. 49; *Broom's Legal Maxims*, 89. There should have been a demand upon, and non-compliance by, defendant Hunter, of a copy and perusal of his warrant before action, the recital in the pleadings having alleged the issue of one: *Addison* on Torts, 877; 24 Geo. 2, ch. 44, sec. 6. The findings of the jury, the instruc-

tions for which, by the learned Judge at the trial, were based on a misconception of the action, did not in any case justify the entry of judgment for the plaintiff.

Robertson, Q. C., contra. The only question is, whether the notice of action is sufficient, and it is contended there was no conversion on the day stated in the notice, 27th May, 1884. The fact is there was a conversion on that day. It was on that day, after the investigation before defendant Armour, as a Justice of the Peace, that he stated to plaintiff that there was no charge against him: his plain duty was then to restore the animal. The plaintiff then demanded it. The Justice excused himself by saying it was not in his custody, but in that of defendant Hunter, the constable. Plaintiff then demanded it from him, when he refused unless the Justice ordered him to restore it. Then the demand was renewed on the Justice, who excused himself by saying he would consult the Crown Attorney as to whom he should give it. This shewed want of sincerity in the Justice; his conduct was inconsistent. Besides, it would afford no justification to act on the advice of the Crown Attorney; the advice of any other lawyer would have served the same purpose; and if he acted on that he would do so at his peril; it affords no excuse for depriving plaintiff in such a manner of his property. The retention by defendants, after the demand on the 27th May, was at their peril; the conversion was complete then, and their conduct, when taken into account with the fact that they afterwards gave it to Carpenter, shewed their intention to so act from the beginning, and the jury found that fact. Defendant Armour, in his evidence, said, "It was my duty to decide who was the owner. The evidence shewed it was Carpenter's. I therefore gave it to her," shewing that he was acting in a civil capacity. The law is clear that the moment the Justice found that plaintiff came by the colt honestly, it was his duty to restore the animal to the plaintiff's custody, he claiming to be the *bona fide* owner. The constable took it, he says, by virtue of the search warrant; but he was privy to the

fraud. If there had been a *bona fide* intention to follow the alleged thief, there might be some excuse for holding it for three or four days; but there was no such intention, and the jury so found. Defendant Hunter said he had a warrant for a man, Hill, who, it was said, was the thief, but Hunter took it upon himself to say that he did not believe Hill had stolen it, and therefore he would not arrest. All this goes to shew a conspiracy to deprive plaintiff of the animal, and that the defendants, at the instance of VanLoan, set the criminal law in motion for that and no other purpose. Plaintiff was and is a man of wealth and position, a practising physician. Replevin was the proper remedy, instead of by search warrant. The jury found the animal had not been stolen. The jury also found that defendants did not hold the animal for the purpose of the criminal charge—that it was taken under the search warrant for the express purpose of handing it over to Carpenter, so that she might give it to VanLoan, who had given her \$40 for her chances, &c. Both defendants knew this was the intention and object of setting the criminal law in motion, and they lent themselves to it; they did not intend to follow up the alleged criminal charge, and the jury so found. The conversion was therefore complete on 27th May: see *Gladstone v. Hewitt*, 1 C. & J. 565 *Newton v. Beck*, 27 L. J. Ex. 272; *Ballard v. Pope*, 3 U. C. R. 317, and cases there cited. Besides, on the findings of the jury, defendants were not entitled to notice; they were corruptly setting the criminal law in motion for an illegal purpose. But suppose, for argument sake, that defendants were entitled to notice; they got it, and the notice was good under the statute, which required “the cause of action to be clearly and expressly set forth.” This was done, and the evidence shewed it. It is insisted upon that time is material, but if that is to be strictly construed, then the hour of the day should be stated; there might be no conversion at noon, and one at 4 p.m. The time stated, and the nature of the charge set forth, gave the defendants “clear and explicit” notice of what plain-

tiff complained. In *Gimbert v. Coyney*, McC. & Y. 469 the notice was drawn in the form of an ordinary declaration, and stated the time of the alleged trespass to be on 16th August, 1824, "and on divers other days and times between that day and the date thereof," (26th November, 1824,) three months after, and that was held good.

January 6, 1885. WILSON, C. J.—The jury found that Armour did not believe he was acting in his duty as a Justice of the Peace when he served his warrant so as to discover the person who stole Mary Carpenter's colt, but to take the colt from Dr. Howell and give it to Mary Carpenter: that he did not intend to capture the thief, but to transfer the colt; and also that Hunter and Armour were acting in concert to take the horse from the plaintiff and to give it to Mary Carpenter; and that Armour was acting to determine a civil right between the two parties, rather than to put in execution the criminal law.

The jury, however, at the same time found that Armour did believe he was acting in the discharge of his duty when he refused to give up the horse to the plaintiff after hearing the evidence, and that he himself believed he was acting in the discharge of his duty as a Justice of the Peace when he ordered the horse to be given up to Mary Carpenter. These findings are very inconsistent, for Armour could not at the same time and by the same proceeding believe he was acting in the discharge of his duty as a Justice of the Peace when he refused to give up the colt to the plaintiff, and when he ordered it to be given to Mary Carpenter, and yet not be acting as such Justice when he issued his warrant. Nor could he have believed he was acting as a Justice of the Peace, as just stated, and yet have been acting in concert with the constable to take the plaintiff's property and give it to another, by means of this criminal process, under the pretence that he was executing the criminal law, when his purpose was merely to try a civil right of property.

The statement of claim does not treat the defendants as

mere wrongdoers ; on the contrary, the whole case made against them by the pleadings is not that they abused the legal process, but that after the magistrate had declared there was no charge against the plaintiff, that he had in any way been concerned in the taking of the colt, or was in any way concerned in its criminal detention or concealment, he, nevertheless, and the constable also, wrongfully refused to deliver up the colt to the plaintiff, although the plaintiff demanded the colt from both of them, the plaintiff contending that after the adjudication acquitting him "the Justice of the Peace had no power to do anything further in the case."

Upon such pleadings the third question is irrelevant ; the fourth was not answered ; the fifth and sixth are in favour of the defendant Armour ; the seventh is also irrelevant, for it refers to the fifth and sixth questions, and they, and by consequence the seventh question, are as to Armour's belief that he was acting as a Justice of the Peace. The eighth question must fail also for the like cause ; the ninth was not answered ; and all the other questions and answers before referred to, not in the list delivered to the jury to answer, fall to the ground for the like cause. The questions contained in the list not yet mentioned are the first and second, which cannot be objected to.

If the action then be considered as an action against a Justice of the Peace and a constable, and it must be so considered if the statement of claim is to have any effect, for that neither the Justice nor the constable would give up the colt to the plaintiff upon demand made by him after it was declared the plaintiff was in no way connected with the taking, nor with any criminal detention of the colt, then the first enquiry is, whether the defendants were wrong doers in not giving back the colt to the plaintiff upon his demand of it upon the 27th of May, to which day the notice of action is confined ? That depends upon the fact whether it appeared upon the investigation that the colt had been stolen or not.

It is said: "If, on the return of the warrant before the Justice, it appear the goods were not stolen, they are to be restored to the proprietor. If it appear they were stolen, they are not to be restored to the proprietor, but deposited in the hands of the sheriff or constable in order that the party robbed may proceed, by indicting and convicting the offender, to have restitution. The party who had the custody of the goods is to be discharged if they were stolen, and if they were, but not by him, but by another person who sold or delivered them to him, and it appears he was ignorant of the mode in which they were procured, he may be discharged, but bound over to give evidence as a witness against him that sold them. If it appear he knew them to be stolen, then he should be bound to answer the felony, for there is a probable cause of suspicion at least that he was accessory after the fact:" 1 Chitty Cr. Law, 2nd ed., 67.

The authorities referred to bear out the text I have quoted.

The jury have found by their fifth answer that Armour did believe he was acting in the execution of his duty when he refused to give up the horse, which was on the 27th day of May. The sixth answer, that Armour believed he was acting in the execution of his duty when he ordered the horse to be given up to Mary Carpenter, is not within the notice of action, for the delivery of the horse to her was not till some few days after the 27th of May.

This is a case in which the Justice had jurisdiction over the subject of complaint, and the notice of action and the statement of claim showed it to be so.

It is an action therefore under the first section of R. S. O. ch. 73, by which it is required that it should "in the declaration, be expressly alleged that such act was done maliciously and without reasonable and probable cause," and there is no such allegation in the present statement of claim, nor in the notice of action, which the statute, sec. 10, declares shall be given, and in which notice "the cause of action and the Court in which the same is intended to be brought shall be clearly and explicitly stated." Then, sec-

tion 1 further provides, "that if at the trial of any such action, upon the general issue pleaded, the plaintiff fails to prove such allegation he shall be nonsuited, or a verdict shall be given for the defendant."

The declaration must, in a case of the kind, allege malice and the want of reasonable and probable cause: *Somerville v. Mirehouse*, 3 L. T. N. S. 294; *Kirby v. Simpson*, 10 Exch. 358.

In *Taylor v. Nesfield*, 3 E. & B. 724, the declaration alleged malice, and a want of reasonable and probable cause, but the notice of action did not allege malice, although it did allege a want of reasonable and probable cause; and Erle, J., was of opinion the notice was bad for that omission. The Chief Justice said if the omission of *maliciously* from the notice had been the only objection, he would have striven to support the notice. The other two Judges say nothing clearly about the effect of the omission from the notice.

The notice of action fails as well as the statement of claim, and the *bona fides* of the defendants was not in issue. The addition of the omitted words to the statement of claim would have allowed the plaintiff to prove the colourable purpose suggested for which the warrant was issued, and upon which the jury found adversely to the defendants; but that could not be done, for it would then have varied from the notice of action.

As to the cause of action relied upon, which was merely the not giving up of the colt to the plaintiff upon demand made of it by him, because he had been discharged from all liability in connection with the alleged larceny, and it is clear that does not shew a sufficient ground for a claim to the restitution of the property, because the magistrate is entitled to have the property detained, if it has been proved to have been stolen property, until the larceny can be tried, or, I presume, until it has appeared no trial for the offence can be had, on account of the absence of, or the inability to discover the thief, or the like; and the statement of claim does not allege that the informant

failed to prove the colt in question had not been stolen. The cause of action is therefore imperfectly stated.

I am of opinion the notice of action and statement of claim, being each of them founded upon a cause of action arising in a case in which the Justice had jurisdiction, are defective for want of the allegation that the Justice acted "maliciously and without reasonable and probable cause;" that the statement of claim is defective in not showing a right to restitution of the property although the plaintiff was acquitted of any wrongful taking, detention or concealment of the property; and I am further of opinion that striking out from the evidence and from the answers of the jury all matters shewing the magistrate issued and proceeded upon the search warrant colourably under pretence of enforcing the criminal law, but in reality to deprive the plaintiff of his property, and to transfer it to the informant, or, in other words, maliciously and without any reasonable or probable cause, there was no cause of action proved against the defendants. The fifth finding is expressly in their favour, and even if there had been no other impediment to the plaintiff's recovery, the inconsistent fifth and sixth findings, with the other findings of the jury, would have made it necessary to set aside the verdict at the least, and to order a new trial.

I do not see how, in any view of the case, we can support the verdict and judgment for the plaintiff. We are obliged to set them aside; and, as we have all the facts before us, we dismiss the action, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

Action dismissed, with costs.

[QUEEN'S BENCH DIVISION].

KINVER V. THE PHOENIX LODGE, I. O. O. F.

*Trespass to person—Lodge of Oddfellows—Initiation of member—
Liability of corporation for acts of members.*

The plaintiff, during his initiation as a member of the defendants' lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked. *Held*, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained.

THIS was an action for personal injuries sustained by the plaintiff at his initiation into the order of Oddfellows in the defendant's lodge, on the evening of the 26th of November, 1883.

The action was tried at the last Fall Assizes at Whitby, before Galt, J., without a jury.

The evidence necessary to be referred to was as follows:

The plaintiff said: "On the night of the initiation Mr. Connors, a member, adjusted the cap for me in the ante room of the lodge; it blindfolded me. I was then taken, as I suppose, into the lodge room. My hands were then tied to my sides above the elbow, I think, and I think by a chain. I was shoved then from behind at the small of the back; it was a violent push. I felt something then catch my legs. My head struck first; the push knocked me over. My feet were lifted up. It bent me the wrong way backwards. My head struck on the floor, and my legs were carried up. As soon as I reached the floor I felt my back was hurt. My temple struck: it was injured, and my eye was swollen. When I got to my feet I was led round a few times, with the chain still on; no harm was done to me after that. Before the lodge was closed the Noble Grand (the head of the lodge) came to me and said, 'I am afraid we hurt you.' I said, 'You have hurt my

back.' The cap was taken off me in ten or fifteen minutes after I was on my feet. I complained of my back as soon as I went home. I have not been able to do a day's work since then. I had been in good health till then. It was a sharp pain for three months; since then it was a dull pain. I put off going to a doctor as long as I could. I went to Dr. Cockburn nine or ten days after I was hurt; I had worked before going to him, doing what I could; did light work, could not lift anything; I had Dr. Cockburn for three months. I then went to Dr. Rae, and was under his treatment for four months. I then went about 5th July, 1884, to Dr. McCulley of Toronto, who examined me, and Dr. Aikins about 9th of August, who advised me to use crutches. I have been getting worse all the time. Dr. Cockburn is the lodge doctor. Can't tell what I owe Dr. Rae. I paid Dr. McCulley \$35; I paid Dr. Aikin \$6. I went to Toronto from Oshawa six or seven times to see the Toronto doctors."

In cross-examination he said:

"I have been of sober habits from 1879 till my initiation. I had not one drop of liquor. I cannot say I have been on a spree since then. I have been since then slightly the worse of liquor. I have been not so drunk but I could get home myself. Before 1879 I drank considerable. From 1879 till my initiation I drank nothing. Since then I may have been twice the worse of liquor. In 1878 I was on some sprees. In 1877 I drank nothing; for a few years before 1877 I drank sometimes, and again for four or five months at a time I did not. I got on sprees periodically. The sprees would last three or four days. That might happen three or four times a year. That did not last so long as five or six years. I went to see Dr. Cockburn: he said he knew I was hurt before I came, and if he had been there it would not have happened."

Kennedy, who worked with the plaintiff, said: "The plaintiff's health was always good till the accident, and able to do a full day's work; since then he has been in ill health."

Bassett, who also worked with him, said the same, and that he did not know a better chair maker in Oshawa.

Luke said the plaintiff worked in the business he had in Oshawa ; had never heard him complain of ill health before the initiation ; he always did a good day's work ; he was a very good workman ; found him after that absenting himself for a few hours every day, and for a longer time latterly ; for the last three or four months he had worked about half time.

The plaintiff's wife spoke also of his previous state of health.

Dr. McCulley said he examined the plaintiff carefully for about one hour, and the conclusion he arrived at was that there was a chronic inflammation of the membranes of the spinal cord, with a probable injury of the cord itself : that he should say there was a surface of between forty and fifty square inches where the electrode indicated there was a want of nervous force, which was a partially paralyzed condition : that such a condition might take months to develop, and that it was slow to heal, requiring rest : that the disease with plaintiff had been increasing considerably, extending up the cords towards the brain : that his arms were not so much affected when he saw him, but both legs were in a condition indicating a want of nerve force, a condition which was just what he would have expected : that in the most favourable view of his case it would take a year to get well, and he doubted if he got well that he could ever go to manual labour again : that he would put a plaster jacket on him, and he should not use crutches, which injured the back ; and that the chances of recovery were bad in his case.

In cross-examination he said that the injury could not have been from a blow in the head, but from a blow in the back, and any force sufficient to cause a sharp curvature in the spine would do it : that a wrench might cause the injury.

For the defence.

George W. W. Billings was examined :

"I was the *Noble Grand* at the time of the initiation. I was at the further end of the building at the time of the accident. I could not see what was being done with the plaintiff then. Connors conducted the plaintiff into the room. Chaining or tying the candidate is part of the ceremony—securing his arms in that way—generally by a chain: it is done by officers whose duty it is. Pushing or shoving a man is no part of the ceremony: personal violence is no part of it. I asked the plaintiff at the close of the initiation did the boys use him any ways rough. He answered by saying nothing particular, he got a bump on his head, but nothing further. I asked the question because I heard an undue noise. I was not during the ceremony a moderator or a director at that time; a subordinate would check any disorder."

Cross-examination.

"The ceremony took place in the lodge room. After the candidate enters the room a charge is delivered to him; then he is chained above his elbows. The conductor of the candidate delivers a charge to him and conducts him from one portion of the lodge room to another to present him to the various officers, and each one of them delivers a charge to him. He is then brought to the Noble Grand's chair, who gives him instructions on the degree he is taking. The chair occupied by the Noble Grand is screened off from the rest of the room. The room is usually kept dark during an initiation. The ceremony may take three-quarters of an hour or an hour. There are four officers. No one is permitted to touch the candidate but these officers. Lectures and instructions cover the whole ground of initiation. The usual effort made is to bewilder, to befog, so that the candidate will not know where he is, or anything about it. When a candidate is blindfolded it is usual to mystify him or to make an effort in that direction, that he would not know where he came from, or would not be able to find his way out when he was restored to light and liberty. The conductor would turn him around. I never saw a candidate pushed; there is no blanket or tar-

Paulin used that I know of. I have heard unusual noises at these celebrations before. I have seen a candidate taken and rolled on the floor when he was blindfolded and before the ceremony commenced, and before the conductor took charge of him. I would not consider rolling on the floor injurious; it occurs before the man is chained; possibly the conductor is a party to whatever is done to the candidate; the conductor takes charge of the candidate the moment he enters the door. Hearing the noise, I supposed some of his shop mates were having a little lark with him. I had heard that noise before, and never took any active steps to stop it.

I called on Dr. Cockburn to see the plaintiff. I had heard the plaintiff was injured. He did not complain so much to me about the usage he had received as that the visiting committee had not paid proper attention to him. He complained to me of his back when speaking of his injuries. He spoke in strong terms of the treatment he had received. I said if it occurred it was not intentional. I won't be positive that what he said was that he was injured at the lodge."

James Garrett, Vice-Grand, said: "I saw plaintiff as he entered the room. Some members crowded round him as he passed in, and I saw him get a shove by some of the members; could not say whether by one or more, and of course he fell and struck his head. The lodge being in my charge, I called it to order, and the thing stopped short. The ceremony had not then begun. That begins by the conductor giving his charge. The charge had not then begun. The plaintiff fell as he came in at the door. He was blindfolded when he fell, but not chained."

On cross-examination he said:

"The candidate is first taken possession of by the lodge in the ante-room. He is blindfolded in the ante-room. He is delivered by the conductor, who takes him in to the conductor, who is inside the room. The chain would be allowed to be put on when the charge was delivered by the conductor to his candidate. I say the chain was not

put on the plaintiff till after the charge. The plaintiff was thrown before he took the little obligation which is necessary before he is allowed to proceed further than the place where the inner conductor takes charge of him. He was shoved seven feet. He was tripped by the cover of the organ that we use there; it was held in front of him a little above his knees."

Wm. Warner, a member of the lodge, gave evidence to the like effect as Mr. Garrett.

W. W. Dowsley, a member: "I saw some one give him a shove. Some held a canvas, an organ cover, I suppose, with the intention of putting the plaintiff in it, and he went over it, and he turned over and struck on his head or shoulder. The plaintiff said the next day he felt all right, he felt a little stiff in the morning."

James Gregory worked in the same shop with plaintiff. In the summer of 1883 the plaintiff complained of his back. Never heard him complain again of it till after his initiation.

Doctors Cameron, Cockburn, Rae, and Farewell, did not believe the injury as described by the plaintiff, and the condition he was in, and had been in, could possibly be the effect of what was done to him at initiation. They each examined him carefully, and they believed he was suffering from general debility and nervousness, caused chiefly by working in an overheated room, and overworking himself, and not protecting himself in afterwards going out into the cold air, or by depression of spirits.

George Rice: "I made a belt for the plaintiff more than a year ago to support his back—to strengthen it."

After the close of the evidence the learned Judge adjourned the case until hearing the arguments of counsel for the parties, which took place at Osgoode Hall, and he subsequently found the defendants guilty of the trespasses alleged, and that the plaintiff was in a sound state of health when he submitted himself for initiation; and he assessed damages to the plaintiff at \$580, and gave judgment accordingly.

Murton, for the defendants, gave notice of motion to the plaintiff that he would move the Court that the judgment given for the plaintiff and his assessment of damages herein be set aside, and that judgment be entered for the defendants, on the ground that the judgment and assessment were contrary to law and evidence, and to the weight of evidence; that there was no evidence upon which the defendants, a corporation, could be lawfully held liable for the injury or act complained of by the plaintiff; and no evidence, or no sufficient evidence, to shew that the injury and loss for which the said damages had been assessed were the result of any act done to or injury sustained by the plaintiff on the occasion of his initiation; that the allegations in the defendants' statement of defence were proved; and that the damages were excessive and not warranted by the evidence.

Robinson, Q. C., supported the motion. The defendants are not liable for what was done to the plaintiff at his initiation, which he says has occasioned him the injury he complains of. The acts complained of were the unauthorized acts of some of the members of the body, and for such acts the defendants were not in law responsible. He referred to the following authorities: *Emerson v. Niagara Navigation Co.*, 2 O. R. 528; *Erb v. Great Western R. W. Co.*, 42 U. C. R. 90, 3 A. R. 446; *Oliver v. Great W. R. W. Co.*, 28 C. P. 143; *Erb v. Great W. R. W. Co.*, 5 S. C. 679; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill. (N. Y.) 479; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comstock, 479; *Evansville R. R. Co. v. Baum*, 26 Indiana, 70; *Rounds v. Delaware R. W. Co.*, 64 New York 129; *McManus v. Crickett*, 1 East, 106; *Goff v. Great N. R. W. Co.*, 3 E. & E. 672-678; *Poulton v. London and S. W. R. W. Co.*, L. R. 2 Q. B. 534; *Edwards v. London and N. W. R. W. Co.*, L. R. 5 C. P. 445; *Allen v. South Western R. W. Co.*, L. R. 6 Q. B. 65.

The defendants do not believe the plaintiff was injured at the time or in the manner he represents. He did not complain of anything for three weeks after his initiation.

Then he went to a succession of doctors, and all of them but Dr. McCulley said they did not believe that what the plaintiff was suffering from was from what he says was done to him on his initiation.

Ritchie, contra. It is not denied that a corporation is not liable for the unauthorized acts of its agent, or for acts done outside of the business of the corporation. The allegation here is that the acts were done where and when and in the presence of the corporation and while it was in session, and while the principal officers and many of the members were present in a regular meeting of the body for the purpose, among other things, of initiating the plaintiff as a member, and it was in the course of that initiation the very business for which, among other things, the lodge was assembled, that the plaintiff was injured. He refers to *Bayley v. Manchester R. W. Co.*, L. R. 8 C. P., 14; *Ramsden v. Boston and Albany R. W. Co.*, 104 Mass. 11; *Limpus v. London General Omnibus Co.*, 1 H. & C. 52; *Seymour v. Greenwood*, 6 H. & N. 359; S. C., 7 H. & N. 355.

The plaintiff was in perfect health before his initiation and had been for thirteen years before, and it was not until that initiation he complained of his health being affected.

Robinson, Q.C., in reply, referred to certain portions of the evidence shewing that the plaintiff had been indulging in drink before his initiation, and also as to the prescribed ceremonies on the occasion; and that the plaintiff's injuries were not the result of that night's proceedings.

January 6, 1885. WILSON, C. J.—It is quite clear that a servant acting in the line of his duty, business, or employment will render the master liable for the acts he does.

It is at times difficult to determine what acts of a servant will be considered to be done within the line of his duty, business, and employment.

What was it then that was done in this case?

The plaintiff, in the course of his initiation, was blindfolded by the conductor of the lodge, who was in the ante-room, and was then taken by him and given in charge to the conductor who was inside of the lodge room, and while in his charge the linen cover of an organ was held before him, and he was pushed violently by some one or more of the members at the small of the back, and sent forward about seven feet, and at the same time coming in contact with the organ cover, which was held so as to catch him a little above the knees, he was tripped, and going beyond the cover either at the side or at the far end, he struck the side of his head upon the floor, and, as he says, the cover was then raised and his feet were raised by it, so that his back was hurt, and he felt he was hurt in the back. When he got up the ceremony was then properly proceeded with.

After the initiation was over the Noble Grand, having heard the noise while the plaintiff was being pushed and thrown down, asked the plaintiff "if the boys used him anyways rough," and he answered, but the answer the plaintiff made, that he was hurt in the back, is not concurred in by the witness, who says he answered: "Nothing in particular, only he got a bump on the head." The plaintiff did complain very shortly after that night of his back, and he has been treated for it, and there is medical testimony that he has been injured in the back, and that his description of the way in which he says he was injured, is sufficient to produce the complaint from which he is now suffering.

Dr. Cameron, called for the defence, said: "I would not say a push could not possibly produce what the plaintiff is suffering from, but such as I have heard described would not be likely to produce it."

Dr. Cockburn said: "I did not find any signs of the kidneys or bladder, or any other organ being affected, and which I would expect to be affected if the plaintiff were suffering from inflammation of the spinal cord." He thought the plaintiff was suffering from debility and nervousness

arising from work in an overheated shop, and over working himself, and from the change of such an atmosphere to the cold air without an overcoat, when he went out.

Dr. Rae said: "I do not think the plaintiff is suffering from what he has described. The symptoms are not so severe as to account for his state. The symptoms, I think would have been developed more severely and promptly. I find nothing to shew me he is suffering from inflammation of the spinal cord."

Dr. Farewell agrees also in that opinion, and he intimates that the plaintiff was assuming to suffer more than he really did, for he said, "I endeavoured to take his attention off as much as I could, and then when I placed my finger on the spot he did not flinch as much, although I put on more pressure."

Mr. Rice said he made a belt for the plaintiff's back the summer before he was initiated. The evidence of the plaintiff's fellow workmen shews he was in good health, and able to do full work until his initiation, but that he has fallen off since then.

The learned Judge has found in favour of the plaintiff upon that point of the case, and we cannot say his decision was not quite correct. The evidence does fully sustain his finding, although there is unquestionably opposing testimony which is entitled to the greatest respect and confidence. But the case presented is simply this: up to the time of the initiation the plaintiff was in good health, although apparently a nervous excitable man, and was able to do a full day's work, and able to do more than almost any man in the shop in which he worked. He did receive some injury at the initiation, and some time or shortly after that time he was not able to attend to his work with any regularity, or to do as much work when he did go to the shop as he did before the accident, and the doctors differ upon the question whether his condition is attributable to the occurrence of the night of the initiation or not. There is evidence to support the case, the weight of evidence I think is with the plaintiff, and the learned Judge

has so found, and we would not be justified in interfering with that finding.

Then as to the other part of his case, whether the defendants are liable for the acts of the members who treated the plaintiff in the manner complained of.

The evidence shews there was certainly some noise in the course of the plaintiff's initiation, so that order was called by the officer then in charge of the proceedings, and the Noble Grand or principal officer afterwards asked the plaintiff "if the boys had used him anyways rough."

Personal violence is no part of the regular procedure in such a case; but it appears from the evidence of the principal officer, who is not likely to say more of the proceedings of a secret lodge than he could avoid, that he has "heard unusual noises in these celebrations before. I have seen a candidate taken and rolled on the floor when he was blindfolded, and before the ceremony commenced." And he added: "I would not consider rolling on the floor injurious. It occurs before the man is chained." And also, "I supposed some of his shopmates were having a little lark with him. I had heard that noise before, and never took any active steps to stop it."

These proceedings being taken in open lodge, while the principal officers and a number of the members were present, so as to constitute a full and perfect meeting, and where none but members and the candidate were or could be present, is manifestly a proceeding taken with the knowledge of all those who were there, and who represented the corporate body; and where it appears that these and the other proceedings had taken place on such an occasion, and that they were allowed and not checked, it shews, I think, they were taken also with the consent of the body which was then in open lodge assembled.

I have looked at all of the cases to which we were referred on the argument, and the only bearing they have upon this case is, that they establish beyond any doubt in our opinion that upon the facts proved the defendants are certainly responsible to the plaintiff for what was thus

done to him to his personal injury, to which he was in no sense a consenting party, although he was seeking admission to the benefits of the Order.

We regret the litigation that has arisen from this unfortunate accident: no injury was intended; but harm was nevertheless done, and serious consequences have followed from it. The plaintiff has claimed compensation: that has been awarded to him. It will be better in all such bodies to enforce rigidly the directions given by the *Ritual* of this order, "no rough usage to be allowed" to the candidate, for a practical joke or lark at such a time, although sport to the one party, may be very hurtful to the other, and may end quite differently from what was desired or could possibly have been expected.

We must dismiss the motion, with costs.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

FEDERAL BANK V. NORTHWOOD ET AL.

Partnership—Accommodation endorsement—Right to recover.

The plaintiffs discounted a note for J. N., the maker, payable to and endorsed by a firm in the partnership name by one of the partners, the plaintiffs knowing that it was so endorsed as security for J. N., and having no reason to suppose that it was in connection with the partnership business : *Held*, that the other partners were not liable.

ACTION to recover the amount of a promissory note, dated 1st November, 1883, made by John Northwood, payable twelve days after the date thereof to Joseph Northwood & Son, or order, and endorsed by Joseph Northwood & Son to the plaintiffs, for \$3,400; and of a promissory note, dated 3rd November, 1883, made by John Northwood, payable twelve days after date to the order of Joseph Northwood & Son, and endorsed by Joseph Northwood & Son to the plaintiffs, for \$7,600.

The defence set up by Joseph Northwood was, that Andrew Northwood, his son, and he carried on business as saddlers and harness makers under the name of Joseph Northwood & Son : that his son Andrew Northwood endorsed these notes in the partnership name of Joseph Northwood & Son without his knowledge or consent, and without any authority from him, and for the accommodation merely of and as surety only for John Northwood, the maker of the said notes, and that the plaintiffs, with full knowledge of these facts, discounted the said notes for the said John Northwood.

The case was tried before Burton, J.A., at the last Spring Assizes at Chatham, without a jury.

The manager of the plaintiffs' bank at Chatham was called, and proved the signature of John Northwood to the notes, and that the endorsement thereon of Joseph Northwood & Son was in the hand writing of Andrew Northwood, who together with his father, Joseph Northwood carried on the business of leather and harness in Chatham,

under the name of Joseph Northwood & Son: that these notes were discounted by him as manager of the plaintiffs for John Northwood, the maker thereof, who had an account with the plaintiffs' bank at Chatham: that Joseph Northwood & Son had no account with the plaintiffs' bank: that it was arranged between him and John Northwood that John Northwood should get advances upon these notes endorsed by Joseph Northwood & Son, and by Howard & Northwood: that both parties were security for John Northwood, namely, Joseph Northwood & Son, and Howard & Northwood: that his recollection, as far as he could remember, led him to believe the advances were to take up a note elsewhere: that he never saw Andrew or Joseph Northwood on the subject: that he dealt with John Northwood as the principal, and the two firms as his sureties, for the payment of the notes: that he had no reason to suppose that the transaction was in connection with the business of Joseph Northwood & Son, but he could not state positively.

The plaintiffs thereupon closed their case, and the learned Judge, being of opinion that the plaintiffs must fail on this evidence, allowed the manager to be recalled, who stated: "If you will allow me to state my views, I discounted the notes on the strength of the three parties. There was no open running account with John Northwood before this. There was a discount account, but not an open account. I merely supposed the advances were to take up another note. I have no actual knowledge. The proceeds of these notes were carried to the credit of John Northwood's account in the bank, and he chequed them out in the ordinary course. He may have taken them in one amount; at all events, the proceeds were passed in our books credited to him."

The counsel for the plaintiffs, in answer to a question by the learned Judge, said that he was not prepared to prove affirmatively that Joseph Northwood was an assenting party: that he thought that he was not bound to do it, and that he should not attempt to do it.

The learned Judge, this being the only evidence offered for the plaintiff, made this ruling: "I think that the evidence establishes that the debt was that of John Northwood; the advances were to be made to him, he offering as security the endorsement of the partnership. Under those circumstances, having notice that the partnership endorsement was not for anything connected with the partnership business, the plaintiffs were bound to go further and show affirmatively that the partnership signature was given with the knowledge or assent of the other member of the firm, and without that additional evidence there is no case for the jury as against him." He, thereupon, gave judgment for the defendant Joseph Northwood, and against the other defendants.

May 21st, 1884. *Lefroy*, for the plaintiffs, obtained an order *nisi* to set aside the judgment and for a new trial, or for a judgment for the plaintiffs, on the grounds that the entering of said judgment was against law and evidence and the practice of the Court, in that the learned Judge, on evidence brought out on cross-examination of plaintiffs' witnesses in support of defendants' defence, by the defendants' counsel, held that at the time the plaintiffs discounted the notes sued on they were aware that the notes were accommodation notes, as far as the endorsers were concerned, for said John Northwood, for whom plaintiffs discounted same, and that therefore they were not entitled to recover; and in that the learned Judge would not let the case go to the jury on the grounds that it being shewn that the said notes were discounted for the defendant John Northwood by the plaintiffs on the endorsation of the defendants Joseph Northwood & Son, and that such endorsation was or was supposed to be for the accommodation of the said John Northwood, it was the duty of the plaintiffs to have made enquiry from the members of said firm as to their mutual consent to such endorsation before discounting same; and on grounds disclosed in the evidence, Judge's notes, and papers filed.

November 26, 1884. *Atkinson*, in support of the order *nisi*, contended that the plaintiffs' right to recover was not defeated by the evidence put in at the trial. That could only be so by notice or knowledge of the alleged fraud practised by Andrew Northwood on his co-partner, Joseph Northwood, being proved: that neither notice nor knowledge was proved, nor were there any circumstances from which it could be implied as in the case of *Backhouse v. Harrison*, 5 B. & Ad. 1098; *Harris v. McLeod*, 14 U. C. R. 164, or in *Royal Canadian Bank v. Wilson*, 24 C. P. 364, where one partner to the knowledge of the bank signed and discounted a note in his firm's name, and applied the proceeds in the bank to take up his own note held by the bank. The bank had no reason even to doubt that the note was not endorsed with the knowledge or authority of both partners, and it must be presumed that, being a trading firm, the note was endorsed by authority. Value being proved the onus was on defendants to show knowledge so as to defeat the plaintiffs, which they failed to do: *Sutton v. Gregory*, 2 Peake 150; *City of Glasgow v. Murdock*, 11 C. P. 138; *May v. Chapman*, 16 M. & W. 355; *Ridley v. Taylor*, 13 East 175; *Harris v. McLeod*, 14 U. C. R. 164; *Henderson v. Carveth*, 16 U. C. R. 324; *Hogg v. Skeen*, 18 C. B. N. S. 426; *Musgrove v. Drake*, 5 Q. B. 185; *Swan v. Steele*, 7 East 213; *Lindley on Partnership*, 3rd ed., 326, 329, 266, 327, 490. Even gross negligence is no defence when value is proved: *Goodman v. Harvey*, 4 A. & E. 870; nor can notice be presumed, because the bank discounted the note for the payee, that it was an accommodation endorsement, and that it therefore became the duty of the bank to make enquiry of each partner, as contended: *Cross v. Currie*, 5 A. R. 31; *Henderson v. Carveth*, *supra*.

Bethune, Q. C., contra. *Kendal v. Wood*, L. R. 6 Ex. 243, is a strong case against the plaintiffs' right to recover: see also *Lindley on Partnership*, 3rd ed., 345. The bank, before discounting the note, should have guarded itself by making some enquiry as to the purpose for which the money was required. This enquiry would probably have

led to the true facts of the case, and have prevented the note being cashed. The onus was not on the defendants to shew knowledge on the plaintiffs' part: the plaintiffs should have been on the alert themselves and scrutinized the paper closely when offered to them, asking the question whether it was required for partnership purposes.

January 6, 1885. ARMOUR, J.—There is no doubt that the plaintiffs became the holders for value of the promissory notes sued for when they discounted them for John Northwood, their maker; but they knew when they so discounted them that John Northwood was the principal, and that the endorsers were only his sureties for the payment thereof: that they were in fact accommodation endorsers: that the firm of Joseph Northwood & Son was a partnership firm, consisting of Joseph Northwood and Andrew Northwood, and carrying on the business of saddlers and harness makers, that the firm name was endorsed on these notes by Andrew Northwood; and they had no reason to suppose that the transaction was in connection with the business of Joseph Northwood & Son.

In *ex parte Agace*, 2 Cox's Cases in Chancery, Lord Commissioner Eyre said: "In partnerships both parties are authorized to treat for each other in everything that concerns or properly belongs to the joint trade, and will bind each other in transactions with every one who is not distinctly informed of any particular circumstances which may vary the case. On the other hand, if the transaction has no apparent relation to the partnership, then the presumption is the other way, and the partnership will not be bound by the acts of one of the partners without special circumstances." And Lord Commissioner Ashurst said: "One partner is bound by the acts of his co-partner in all acts referable to the partnership trade, but where a man takes a security from one partner in the name of the partnership, in a transaction not in the usual course of dealing, he takes such a security at his peril."

In *Story on Agency*, sec. 125, it is said: "Each partner is an agent only in and for the business of the firm, and therefore his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it when the other party to the transaction is cognizant of or co-operates in such breach of duty."

In *Story on Partnership*, sec. 127, 7th ed., it is said: "If one partner gives a letter of credit or guaranty in the name of the partnership, it is not to be treated as of course binding on the partnership, for it is not a natural or necessary incident in all sorts of partnership for one partner to possess the power to bind his co-partners by a guaranty. It must be shown to be justified either by the usages of the particular trade or business, or by the known habits of the particular partnership, or by the express or implied approbation of all the partners in the given case. The same rule will apply to cases where one partner signs or endorses the name of a firm to a note as security for a third person, in which note the partnership has no interest, and where it is not in the course of their business."

Sec. 128. "In the next place every contract in the name of the firm, in order to bind the partnership, must not only be within the scope of the business of the partnership, but it must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of by the firm, or in fraud of the firm. For every such contract made with such knowledge or notice will be void as to the firm, however binding it may be upon the individual partner making it."

"The one partner is agent for the other partner, and it is an agency to do all the matters which are within the ordinary scope of business which the partners carry on; but where a partner does that which is beyond this *prima facie* authority with which he is entrusted, those who deal with him do so at their peril:" *Kendal v. Wood*, L. R. 6 Ex. 251, per Blackburn, J.

If the endorsement was without actual authority, and

the plaintiffs when they took the notes knew it was beyond any apparent authority in Andrew Northwood, they cannot recover against the firm. See *Garland v. Jacomb*, L. R. 8 Ex. 216, per Blackburn, J.

"The implied power of a partner does not extend to giving the partnership name to secure the debt of a third person; and without distinct evidence that there was an assent, authority, or recognition of such a making by the other members, he would not be bound: *Wilson v. Brown et al.*, 6 A. R. 411.

"But the action is against the two parties, as being jointly bound by the name of the firm written by one of them on the back of the note, without the sanction or knowledge of the other partner. A partner has no legal right to endorse in the name of the firm, as guaranteeing a note in which the firm has no interest, and not arising from or connected with any partnership dealings; and here the plaintiff admits that when he got the note he knew, as he himself expresses it, all about it": *Harris v. McLeod et al.*, 14 U. C. R. 164.

See also *Royal Canadian Bank v. Wilson et al.*, 24 C. P. 362; *Brettel v. Williams*, 4 Ex. 623; *Hogarth v. Iatham*, L. R. 3 Q. B. D. 643; *Pollock on Partnership*, 30; *Lindley on Partnership*, 4th ed., 325 *et seq.*

In the United States the law is well settled adversely to the plaintiffs' recovery in this case. See *Daniel on Negotiable Instruments*, 2nd ed., sec. 365; *Parsons on Notes and Bills*, 2nd ed., vol. i., 140.

The authorities above referred to shew clearly to my mind that the plaintiffs cannot recover.

The endorsing of notes as surety for third persons was not a natural or necessary incident to the partnership firm of Joseph Northwood & Son, it was not within the ordinary scope of their business, and it was beyond any apparent authority which Andrew Northwood had to bind the firm by such an endorsement. I think, therefore, that the plaintiffs, having discounted these notes with the knowledge they had, cannot recover upon them against

Joseph Northwood, and that the order *nisi* must be discharged, with costs.

WILSON, C. J.—The members of a partnership are *prima facie* not liable upon a note made or endorsed by one member of the firm in the name of the firm, excepting for the purpose and business of the firm or with the consent of his co-partners. If such a note be made or endorsed the holder of it cannot recover against the partnership, unless he prove he took it without the knowledge of the wrongful act, and gave value for it.

In this case the plaintiffs gave value for the endorsement of the partnership name of Joseph Northwood & Co., but when they did so they had notice and knowledge the endorsement was an accommodation endorsement for John Northwood, and was not made for partnership purposes.

The plaintiffs are not therefore entitled to recover. I may refer to *Hogg v. Skeen*, 18 C. B. N. S. 426; *Yorkshire Banking Co. v. Beatson*, 4 C. P. D. 204, S. C. 5 C. P. D. 109; *In re Adanson Fibre Co., Miles's Claim*, L. R. 9 Ch. 635.

If the law protects an innocent partner in such a case, it is equally strict in holding the innocent partners liable for the fraud of his co-partner in matters connected with the partnership business.

I concur in the judgment of my brother Armour.

O'CONNOR, J., concurred.

Order nisi dismissed, with costs.

[CHANCERY DIVISION.]

ROSS V. MALONE ET AL.

Sale of lands by sheriff before return of fi. fa. goods—Irregularity—
43 Geo. III. c. 1—R. S. O. c. 66.

Held, (affirming the judgment of FERGUSON, J., ante p. 215) following *Doe d. Spafford v. Brown*, 3 O. S. 95, and *Ontario Bank v. Kirby*, 16 C. P. 35, decided under 43 Geo. III. c. 1, that the issue of an execution against lands before the return of an execution against goods is, under R. S. O. c. 66, an irregularity only, and not a void proceeding, the provision of both statutes being in effect the same.

THIS case (reported ante p. 215) came on by way of appeal to the Divisional Court from the judgment of Ferguson, J., and was argued on the 22nd December, 1884, before Boyd, C., and Proudfoot, J.

Lount, Q.C., for the plaintiff, who appealed. The facts of the case appear in the judgment of the learned Judge appealed from. There is no doubt the sale of the lands by the sheriff under the execution without a return of *nulla bona* to a writ against goods was utterly bad: *Doe d. Spafford v. Brown*, 3 O. S. 92. The evidence shews that the defendant Boys was the execution creditor, and the purchaser at the sheriff's sale was his solicitor. R. S. O. ch. 66, secs. 14, 15, 16, and 17, shows that a sale made under a *fi. fa.* lands without getting a return of a *fi. fa.* goods is bad. Sub-sec. 2 of sec. 14 shows that the sheriff shall not expose the lands for sale for twelve months, although he keeps them quite safe all that time, and in the meantime he should use all endeavours to make the amount out of the goods. Goods and lands could not be included in the same writ of execution under 43 Geo. 3, ch. 1. That was the law until C. S. U. C. ch. 22, sec. 252, which enlarges the Statute of Geo. 3. The return of *nulla bona* must appear by the sheriff's return. The evidence does not show that the sheriff knew there were no goods: *Mandeville v. Nicholl*, 16 U. C. R. 613; *Eades v. Maxwell*, 17 U. C. R. 180; *Oswald v. Rykert*, 22 U. C. R. 306; *Ontario Bank v*

Kirby, 16 C. P. 41; *Ontario Bank v. Muirhead*, 24 U. C. R. 569. (BOYD, C., you put it that a return of *nulla bona* is necessary to found jurisdiction to sell the lands). Yea

Pepler for the defendant Boys. The plaintiff is estopped because he remained quiescent while the subsequent transfers of the property were made. Where the equities are equal the law must prevail, and we have the legal title (PROUDFOOT, J.—That is the question). We have such a legal title that the plaintiff has attacked it. We also rely on the registry law. [BOYD, C.—Is that pleaded?] Yea, by the defendant Giffin. The plaintiff has not brought himself within the rule for the reformation of the deed in this case. There is no evidence to shew a mutual mistake. The fair result of the evidence is that the return of *nulla bona* was regular, and was made by the sheriff, or with his authority. There was a *nulla bona* return to a concurrent writ before the sale was consummated, which enures to the benefit of the *fi. fa.* in question, and makes the sale good. There is no question but that the defendant was utterly *nulla bona*, and he got all the time he should have got. The time counts from the date of the deed, not the date of the sale. See *Hutchinson v. Collier*, 27 C. P. 249, where the wording of the statute was the same as in this case. The matter is only an irregularity, not a nullity, and if necessary is amendable. Even if the sale was before the return the time was up within which the return should have been made: *Doe d. Spafford v. Brown*, 3 O. S. 92; *Re Lincoln Election*, 2 A. R. 324. The terms of the Act are not imperative but directory merely: *Doe d. Boulton v. Fergusson*, 5 U. C. R. 515; *Helm v. Crossin*, 17 C. P. 156. In *Scott v. School Trustees, &c., of Bathurst*, 5 P. R. 228, after a lapse of ten years the matter was treated as an irregularity.

H. Lennox, for the defendant Giffin. There is nothing to reform by. It is not certain what land was to be inserted in the mortgage. If Ross got his mortgage reformed the defendants Boys and Giffin should be entitled to redeem him and stand in his place. The parties in

possession are not to be disturbed unless the parties attacking have greater equities, and there is no evidence that Giffin had any notice. As a matter of fact he purchased in good faith. The mistake was discovered before the sale and no notice was given to any of the parties. The evidence and the entries in the sheriff's books show that Malone had no goods. If there is any question as to that there should be an inquiry.

Lount, Q. C., in reply. [PROUDFOOT, J.—Mr. Lount, you do not seem to show notice.] That is very true if this was an irregularity, but I contend the whole matter was a nullity, that nothing passed to Boys and Giffin, and that I am entitled to reformation as against Malone. The plaintiff is not guilty of any such laches as would disentitle him to relief. The words of the statute R. S. O. c. 66, sec. 15, "in the same suit or matter by the same sheriff," must mean the same execution, but in any event the sale took place in December, before the *nulla bona* return of March, and not so late as the date of the deed.

December 23, 1884. PROUDFOOT, J.—By 43 Geo. III. c. 1: "Nor shall any such process (execution) issue against the lands and tenements until the return of the process against the goods and chattels."

By R. S. O. c. 66, s. 15: No sale shall be had under an action against lands until after a return of a *nulla bona*, in whole or in part, with respect to an execution against goods in the same suit or matter by the same sheriff.

In *Doe d. Spafford v. Brown*, 3 O. S. 95, it was held that the issue of the execution against lands before the return of the process against goods, was only an irregularity.

Oswald v. Rykert, 22 U. C. R. 306, shews the course to adopt in such a case—to move to set aside the writ against lands.

In *Ontario Bank v. Kerby*, 16 C. P. 35, 41, Wilson, J., says: "But a writ against lands, issued before the return day against goods, is said only to be an irregularity and not a void proceeding, so as to defeat the title of a pur-

chaser of the land, who bought at sheriff's sale; * * and it cannot be that a return of 'no goods' by the sheriff, where there are goods, can be more than an irregularity to be complained of by the defendants if the creditor be wrongfully abusing the process of the Court."

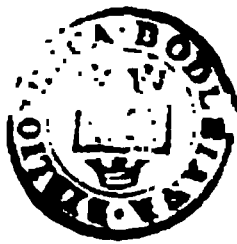
If it was correctly decided under 43 Geo. III., that the issue of the process against lands before a return of a *nulla bona* against goods was only an irregularity, and if a return of no goods where there are goods be only an irregularity, I do not see how we can hold otherwise under the R. S. O. c. 66. The provisions of each statute seem to be as nearly equivalent as language can make them without using the same words.

It is clear that if anything passed under the sale, the plaintiff can have no remedy against Giffin, who is a purchaser for value without notice, nor against Boys his mortgagee, who is equally without notice of the mistake in the deed.

I think the judgment should be affirmed, with costs.

BOYD, C., concurred.

G. A. B.



[QUEEN'S BENCH DIVISION.]

GIBSON V. McDONALD.

Temporary judicial district of Nipissing—Appeal to Quarter Sessions of Renfrew—Grouping Clauses Act—R. S. O. ch. 42.

Justices appointed in 1880 for the temporary judicial district of Nipissing, made a conviction in the said district of one M. for an offence committed there. *Held*, that no appeal would lie under 9 Vic. ch. 10, now Consol. Stat. C. ch. 101, sec. 4, to the General Sessions of the County of Renfrew, being the nearest to the place of conviction, for justices were not appointed under that Act, but under the R. S. O. ch. 42, and the place of conviction was not within any part of Canada then so declared by proclamation under that Act. *Concedo*, per CAMERON and O'CONNOR, JJ., that the County Judge of the County of Lanark had no power to preside at the Sessions in the County of Renfrew, the Provincial Statute authorizing him to do so *ultra vires*. WILSON, C. J., upon this point gave no positive opinion, but inclined to the opposite view.

On the 27th November, 1884, *Osler*, Q. C., for Gibson, moved pursuant to notice given in accordance with 46 Vic. ch. 6, sec. 6, for an order for the issue of a writ of prohibition staying all further proceedings in the County of Renfrew of an appeal to the General Sessions of the County of Renfrew from the conviction of two magistrates, of and in the Temporary Judicial District of Nipissing, of one George McDonald, for an assault on the said Gibson, on the following grounds: 1. That no appeal will lie to the General Sessions of the Peace for the county of Renfrew from a conviction made by a magistrate or magistrates in the Temporary Judicial District of Nipissing, the conviction appealed from having been made by magistrates in the said temporary judicial district. 2. That the chairman who presided at the said Sessions of the Peace for the county of Renfrew was not the Judge of the county of Renfrew, but was a Justice of the Peace of an adjoining county, to wit, the county of Lanark. *Osler*, Q. C., in support of the motion. The Temporary Judicial District of Nipissing was proclaimed on the 17th April, 1858. The R. S. O. ch. 6, secs. 1-47, relate to it.

Vict. ch. 8, sec. 1, took certain townships from that temporary judicial district and attached them to the county of Renfrew. 51—VOL. VII O.R.

of Renfrew. R. S. O. ch. 90, secs. 1 to 20, relate to temporary judicial districts, and secs. 27, 28 specially to Nipissing. Section 46 relates to the appointment of coroners, Justices of the Peace, and constables in these districts. C. S. C. ch. 101, sec. 1, refers to the appointment of magistrates in the remote parts of the Province which are not within any district or county. Section 4 provides that where an appeal lies to Sessions of the Peace it shall be to such sessions which hold its sittings nearest to the place at which the decision, &c., appealed from was made; but appeals under that section can only be from decisions, &c., of Justices of the Peace appointed under that Act, and the decision in this case was not given by magistrates appointed under that Act; and besides these temporary judicial districts are not within the operation of that Act, for they are "within the constituted limits of a district." R. S. O. ch. 5, shews this Temporary Judicial District of Nipissing is composed of surveyed townships. The magistrates who convicted in this case were appointed by the Lieutenant-Governor of this Province on the 20th August, 1880, under the statutes referred to in R. S. O. ch. 90, sec. 46. As to one County Court Judge acting in a different county for another County Judge, he referred to the B. N. A. Act, sec. 92, sub-sec. 14. R. S. O. ch. 42, sec. 22-35, and R. S. O. ch. 44, secs. 6, 7, 8. A County Court Judge appointed for a particular county has no criminal jurisdiction outside of his own county: *Wilson v. McGuire*, 2 O. R. 118.

Irving, Q. C., for the crown. The construction put upon all the statutes referred to is conceded excepting Consol. Stat. C. c. 101. It is said the territory of Nipissing is not within that Act, and that the magistrates who acted in the case were not appointed under that Act. Section 1 of that Act declares, "The Governor in Council may from time to time appoint fit and proper persons to be and act as justices of the peace within, and whose jurisdiction as such justices of the peace shall extend over, such part or parts of the said province, not being within the constituted limits of any district or county, and over such remote parts

of Lower Canada, although comprised within the limits of a district, as the said governor may by proclamation define and declare." It is said the words, "not being within the constituted limits of any district or county," apply both to Upper Canada and to Lower Canada, the word *district* applying to such territories as provincial judicial, temporary judicial, or territorial districts within Upper Canada, and *county* to the established counties in Upper Canada; and as the Temporary Judicial District of Nipissing cannot be said to be *not within* the constituted limits of any district or county, it is not within the terms of the Act, for it is plainly within the constituted limits of the temporary judicial district of which it is composed. But these words, *district* or *county*, do not apply to Upper Canada and to Lower Canada, the term *district* being applicable only to Lower Canada, and *county* applicable only to Upper Canada, because the original Act from which that section is taken, the 9 Vic. c. 41, contained only the word *district*, the Act then reading "such part or parts of the said Province not being within the constituted limits of any district of the Province," there being at that time both in Upper and in Lower Canada only the great and principal territorial divisions of and by *districts*. But, at the time of the consolidation of the statutes in 1859, Upper Canada had for its territorial divisions that of *counties* only, districts in Upper Canada being expressly abolished by the first Municipal Act of 1849, while districts remained as before in Lower Canada to be the name of the territorial division in that part of the Province, and the Consol. Stat., L. C., c. 76, continued that sub-division of Lower Canada. The 1st section of Consol. Stat. C., c. 101, must, therefore, be read as applicable to Upper Canada—that the Governor in Council may appoint justices of the peace, whose jurisdiction shall extend over that part of the Province "not being within the constituted limits of any county," dropping the word *district* as applicable to Upper Canada altogether. If that be so, then the Temporary Judicial District of Nipissing, not being within the constituted limits of any

county, is within the operation of that Act. It is not necessary the Magistrate's Court within these territories should be appointed under the Act. *Regina v. Bennett*, 1 O. R. 445, determined that the Ontario authorities could appoint justices of the peace under the Confederation Act, sec. 92, sub-sec. 14, and a magistrate so appointed under the Ontario statutes is a good appointment for the transaction of all magisterial business within such a judicial district. *Thrasher's Case*, submitted to the Supreme Court by the Governor-General, shows the powers of Provincial Legislatures to legislate in cases providing for the judicial services of Judges. The R. S. O. ch. 42, sec. 13, is the one under which County Court Judges have been authorized in certain cases beyond the limits of their own counties, and *Wilson v. McGuire*, 2 O. R. 118, maintained the legislation which was moved against.

Lash, Q.C., for the original defendant. As to the question relating to the County Court Judge, *Valin v. Langlois*, 5 App. Cas. P. C. 115, was a decision in favour of what had been done by the Ontario Legislature in passing the Act in question. The Judicature Act enables the Judges of one of the Superior Courts to sit in any of the other Divisions of the High Court. Temporary judicial districts were first created by the 9 Vic. ch. 41; see also 20 Vic. ch. 60. Nipissing was proclaimed a temporary judicial district: see Canada Gazette between January and July, 1858, p. 735. By section 5 of the Act of 1857 magistrates were authorized to be appointed for temporary judicial districts. The Act of 1857 was consolidated by Consol. Stat. C., ch. 128, and section 6 of it is the same as section 5 of the Act of 1857. The R. S. O. ch. 90 continues the Consol. Stat. C. ch. 128, and see section 46 of it as to the appointing of magistrates; also Judicature Act, sec. 88, repeating that justices of the peace for the Temporary Judicial District of Nipissing need not possess any property qualification, nor be stated residents within the district. Provisional judicial districts were first created

by 16 Vic. ch. 76. As to appeals from convictions see 32-33 Vic. ch. 31 sec. 65. 33 Vic. c. 27, sec. 1, repeals and amends above sec. 65. 40 Vic. ch. 27 repeals sec. 1 of the last named Act, and amends and re-enacts it. If Consol. Stat. C. ch. 101, is not in force here there is no appeal from the justices of the Temporary Judicial District of Nipissing.

Osler, Q.C., in reply. It is true no appeal lies in this case if the Temporary Judicial District of Nipissing is not within the terms of that Act, and it is not, because it is a part of the Province which is within the constituted limits of a district, although not within the constituted limits of a county. Nipissing has not been attached to any county as Muskoka and Parry Sound have been attached to the county of Simcoe. He referred on the general constitutional question to *In re Squires*, 46 U. C. R. 474; *Lenoire v. Ritchie*, 3 S. C. 575.

January 6, 1885. WILSON, C. J.—The two questions are :

1. Whether an appeal lies from the convicting Justices of the Temporary Judicial District of Nipissing ; and,

2. Whether the County Court Judge of the county of Lanark, who presided as chairman of the General Sessions of the Peace, in and for the county of Renfrew, had the power to entertain and determine the appeal.

The most important question is the first, because if there be no appeal from the conviction of Justices of the Peace for the Temporary Judicial District of Nipissing, the residents of that part of the Province are under a greater disadvantage than the inhabitants in the other parts of the Province, and may suffer great wrong without the means of redress.

The question depends upon the construction of 9 Vic. ch. 41, embodied in the C. S. C. ch. 101.

Section 1 empowers the Governor in Council to appoint Justices of the Peace within and whose jurisdiction should extend to such part or parts of the Province, not being within the constituted limits of any *district* of the Province, as the Governor may by proclamation define, and such

Justices shall not require to be stated residents in such part or parts for which they are appointed, nor to possess any property qualification.

2. But the Justices "appointed under this Act" shall have all the powers, and be subject [excepting as to residence and property qualification] to the requirements of the law regarding the office of Justices of the Peace so far as applicable to the persons "appointed under this Act."

3. When, in the exercise of the powers aforesaid, the Justices "appointed under this Act" shall commit any person to prison, it shall be to the common gaol to which the Justice shall be nearest at the time when he orders such commitment.

4. In all cases in which, under the requirements aforesaid, an appeal lies to a Court of General Quarter Sessions of the Peace, such appeal shall lie to that Court of General Quarter Sessions of the Peace which shall hold its sittings nearest to the place at which the decision, sentence, order, or judgment to be appealed from shall have been made or pronounced, within six months after the date thereof. But nothing herein contained shall extend to appeals from decisions, sentences, orders, or judgments made or pronounced by any Justice of the Peace appointed or to be appointed otherwise than under the provisions of this Act.

In the Consolidating Act, after the words "not being within the constituted limits of any District," the words "or County" were added; and it has been throughout strongly maintained that the term *district* no longer applied to this Temporary Judicial District, because it appeared by the R. S. O. ch. 5, it had been surveyed and laid out into townships, and so was no longer a part of the Province "not within the constituted limits of any District."

I do not think the Act should be so construed, because when the Act 9 Vic., ch. 41, was passed the whole Province, consisting then of Upper and Lower Canada, was divided into *districts*, such as the District of Quebec, Gaspe, &c., in

Lower Canada, and the Home, Midland &c., in Upper Canada; and *district* was the appropriate term then to use with respect to those parts of the Province which were *not within the constituted limits of any District*. But in 1849 *districts* were abolished in Upper Canada, and *counties* substituted for them; and that is the reason why in the consolidation of 1859 the word *county* was inserted in the C. S. C., ch. 101.

In my opinion the addition of the words "*or county*" in the C. S. C. ch. 101 had no other effect upon the 9 Vic. ch. 41, and made no other change in the law, than to make the word *district* applicable to Lower Canada, in which *districts* were still retained, and the word *county* to Upper Canada, in which *counties* had been substituted for *districts*.

On the last argument we were referred to the *Canada Gazette* for proclamations relating to the Temporary Judicial District of Nipissing.

By the *Gazette* of 17th April, 1858, this Temporary Judicial District was defined by metes and bounds, and it expressly recites that it was issued under the authority of the 20 Vic. ch. 60, and since consolidated by C. S. C. ch. 128, and R. S. O. ch. 90.

That Act was passed for a different purpose, and it had a much more extended operation than the original Act. A stipendiary magistrate is appointed in the new district with very large powers; Courts are provided to be held in it, to be presided over by a stipendiary magistrate, whose civil power is regulated by the enactments applicable to Division Courts; and coroners, magistrates, and constables may be appointed, and registrars for the registration of deeds, wills, &c.

The purposes of the 9 Vic. ch. 41, and the 20 Vic. ch. 60, are so different that I do not think the two Acts can be read together as in *pari materia*. A proclamation was issued under the 9 Vic. ch. 41, and Justices of the Peace were also appointed under it—but that is of no consequence, for if the Acts are not to be read in *pari materia*

for the purposes now in question, that Act has practically ceased to have any operation.

I was inclined to hold that the Acts could so far be read together that the Justices of the Peace appointed to act in the Temporary Judicial District *generally* might act as and might be considered to be Justices "appointed under the Act," 9 Vic. ch. 41.

But it does not follow that this Temporary Judicial District is the whole of that part of the Province which was contained in any proclamation which was issued under the Act of 1846; and if it were not, but was a delimitation of part of it, that would be a strong argument against the earlier Act having any application to the territory defined under the Act of 1857. And if it were the same territory, there would still be the difficulty of maintaining that Justices of the Peace appointed after the passing of the 20 Vic. ch. 60 to act in the "Temporary Judicial District of Nipissing" are the justices to act under the 9 Vic. ch. 41.

If they have such power the right of appeal exists, but not otherwise; and if they have such power it would be by reading the words "Justices appointed under this Act," as "Justices appointed to perform the duties of Justices under this Act."

Upon the whole I think it better to concur in the opinion that the Justices who convicted were not acting under the 9 Vic. ch. 41, and that there is therefore not the right of appeal, an appeal being a right "which cannot be implied, but must be given by express words,"—per Lord Denman in the *Queen v. Stock*, 8 A. & E. at p. 411, referring to *Rex v. Hanson*, 4 B. & A. 521, and referred to also by the other Judges.

Upon the point of the County Court Judge of Lanark presiding on the hearing of the appeal in the county of Renfrew I give no positive opinion, as it is not necessary to do so; but I am more in favour of holding that the County Court Judge of Lanark had the power to preside, than to hold he had not.

ARMOUR, J.—This is a motion to prohibit the Chairman of the General Sessions and the Clerk of the Peace of the county of Renfrew, and all other officers of the Court of General Sessions of the Peace for the county of Renfrew, from further proceeding in a certain appeal to the Court of General Sessions of the Peace for the county of Renfrew from a certain conviction made by Charles A. McCool and B. G. Mulligan on the sixth day of March, 1883, whereby they convicted one George McDonald of an assault upon one W. C. Gibson, and ordered him to pay a fine of \$2 and costs, amounting to \$20.20.

The said McCool and Mulligan were with others appointed Justices of the Peace for the Temporary Judicial District of Nipissing in the Province of Ontario, under a commission under the seal of the Province of Ontario, bearing date the 20th day of August, A.D., 1880, and as such Justices they made such conviction at the village of Mattawa, in the said temporary judicial district of Nipissing, for the said offence, which was committed at the said village of Mattawa.

Notice of appeal from the said conviction to the General Sessions of the Peace for the county of Renfrew was given on the ninth day of March, 1883, and at the Court of General Sessions of the Peace for the County of Renfrew, held in June, 1883, the said appeal was brought to trial. The Judge of the County Court of the county of Lanark was the only person presiding at the said Court on the trial of the said appeal, although the Judge of the County Court for the county of Renfrew was, at the time of the said trial, neither absent nor incapacitated by illness from attending the said trial, and was at the town of Pembroke, the county town of the county of Renfrew, where the said County General Sessions of the Peace was held, during the said trial. The said Judge of the County Court of the county of Lanark, after hearing the evidence upon the said trial at the Court of General Sessions of the Peace for the county of Renfrew, quashed the said conviction, on the ground that the said alleged assault was of too trivial a

nature to have warranted the said Justices in convicting the defendant therefor, and ordered the respondent to pay the costs of the said appeal, which were taxed at \$51.25, within thirty days from that date.

The first contention in support of the motion was, that no appeal lay from the conviction of two such Justices of the Peace for the Temporary Judicial District of Nipissing, made in that district, to the Court of General Sessions of the Peace for the county of Renfrew, although it was conceded that there was no Court of General Sessions of the Peace for the Temporary Judicial District of Nipissing when this conviction was made, and that the Court of General Sessions of the Peace for the county of Renfrew was then that Court of General Sessions of the Peace which held its sittings nearest to the place where the said conviction was made.

The Act 32-33 Vic. ch. 31, sec. 65, as amended by 33 Vic. ch. 27, sec. 1, and by 40 Vic. ch. 27, sec. 1, provides that "Unless it be otherwise provided in any special Act under which a conviction takes place or an order is made by a Justice or Justices of the Peace, or unless some other Court of Appeal, having jurisdiction in the premises, as provided by an Act of the Legislature of the Province within which such conviction takes place or such order is made, any person who thinks himself aggrieved by any such conviction or order, may appeal in the Province of Ontario to the Court of General or Quarter Sessions of the Peace." It is clear that under this provision the Court of General Sessions of the Peace for the county of Renfrew had no jurisdiction to try an appeal from a conviction not made within the county of Renfrew, and for an offence not committed within that county, and we must look elsewhere to find such a jurisdiction for that Court; and it is contended that 9 Vic. ch. 41, Consol. Stat. C. ch. 101, conferred it. But there are two objections to this contention, both of which are in my opinion fatal to it; first, that the village of Mattawa is not within any part or parts of the Province of Canada which were ever "defined and declared"

by any proclamation issued under that Act; and second, that the Justices of the Peace who made this conviction were not Justices of the Peace appointed under the provisions of that Act.

We were referred to a proclamation made the twelfth of April, 1858, and to be found in the *Canada Gazette* of that year, at p. 676, defining the Temporary Judicial District of Nipissing, and within the limits of the district so defined the village of Mattawa is included; but that proclamation was issued under 20 Vic. ch. 60, and cannot be treated as a proclamation under 9 Vic. ch. 41.

The convicting Justices were appointed under R. S. O. ch. 71, and not under 9 Vic. ch. 41, Consol. Stat. C. ch. 101, and that Act expressly provides that nothing therein contained "shall extend, or be construed to extend to appeals, sentences, decisions, orders, or judgments made, rendered, given or pronounced by any Justice of the Peace in this Province, appointed or to be appointed otherwise than under the provisions of this Act."

As to the second contention, that the person who presided at the Court of General Sessions of the Peace for the County of Renfrew, at which this appeal was heard, had no authority so to preside, I have but little to add to what I said in *Re Wilson v. McGuire*, 2 O. R. 118, for this is only another phase of the same usurpation.

I do not decide or discuss, but expressly reserve the question as to the power of this Province to appoint Justices of the Peace, and to appoint County Court Judges to be Justices of the Peace for every county and part of Ontario; nor do I discuss the power of this Province to provide that the Judge of the County Court of the county of Lanark shall be chairman at the General Sessions of the Peace for the county of Renfrew, for this has not been so provided; but it is provided that the Judge of the County Court of the county of Renfrew shall be chairman of the General Sessions of the Peace for the county of Renfrew, and when this appeal was tried the Judge of the County Court of the county of Lanark was presiding as chairman of the

General Sessions of the Peace for the county of Renfrew only and not otherwise than by virtue of his office of Judge of the County Court of the county of Lanark, which, in the view I take, he had no right to do.

In my opinion, therefore, both contentions must prevail, and the order must be absolute for a prohibition.

O'CONNOR, J.—Two questions were presented for the consideration of the Court: (1) Whether an appeal lay from a conviction of justices of the peace in the "Temporary Judicial District of Nipissing," to the General Quarter Sessions of the Peace for the county of Renfrew, the county nearest to Nipissing, or not. (2) Whether, if the appeal lay, the Judge of the County Court of the county of Lanark had authority to preside at the said Sessions and try the appeal, or not; the counties of Renfrew and Lanark being grouped together and forming a district for judicial purposes, under cap. 42, Revised Statutes of Ontario.

As regards the first question, the statute 9 Vic. cap. 41, of the late Province of Canada, which was afterwards consolidated and forms cap. 101 of the Con. Stat. Can., provides, by the 1st section thereof, for the appointment by the Governor in Council, of justices of the peace "within, and whose jurisdiction as such justices of the peace shall extend over, such part or parts of the said Province, not being within the constituted limits of any district or county, and over such remote parts of Lower Canada, although comprised within the constituted limits of a district, as the said Governor may by proclamation define and declare"; and it provides that it shall not be necessary for any such justice of the peace to possess property qualification, or to reside in the part of the Province for which he is appointed.

Section 2 confers on such justices of the peace all the powers and authority of ordinary justices of the peace, and subjects them to all the laws of the Province as far as applicable, except as to property qualification and residence.

Section 4 provides that "an appeal shall lie to, and may be brought before and heard and determined by that Court of General Quarter Sessions of the Peace which holds its sittings nearest to the place at which the decision, sentence, order, or judgment to be appealed from was made rendered, and shall be claimed and allowed, and exercised, any time within six months from and after the day of the date thereof; but nothing herein contained shall extend to appeals from sentences, decisions, orders or judgments, made or rendered by any justice of the peace in this Province, appointed otherwise than under the provisions of this Act."

It was admitted on the argument that this Act is still in force; but it was contended by counsel for the Province that the powers, authority, and conditions thereof descended to justices of the peace appointed under R. S. O. ch. 90.

Before the last mentioned Act was passed the Temporary Judicial District of Nipissing had been designated—"constituted"—with limits, by statute.

It does not appear that any Act provides an appeal from the convictions or decisions of justices of the peace appointed under the last mentioned Act of the Province; and the general Act of either the Dominion Parliament, or the Provincial Legislature, providing appeals, does not apply. It appeared to be implied, though not expressly stated in the argument of counsel for the Province, that the appointment of justices of the peace under the Ontario Act mentioned was in effect, or was equivalent to, appointment under the Act, Consol. Stat. Can. ch. 101.

Assuming, for the present, that the power and authority to appoint justices under the Act last mentioned descended to the Lieutenant-Governor in Council of the Province of Ontario, and that he may exercise that power under the provision in that Act mentioned, namely, "within such part or parts of the said Province, not being within the constituted limits of any district or county * * as the Governor may, by proclamation, appoint and declare," does that condition apply to and embrace the "Temporary

Judicial District of Nipissing?" Is the district of Nipissing a part of the Province which is "not within the constituted limits of any district or county?" Though not wholly without doubt, I feel constrained to answer in the negative.

Sub-sec. 47 of sec. 1, ch. 5, R. S. O., declares that the "Temporary Judicial District of Nipissing shall consist of the townships of" (nineteen townships are named), "together with all the remaining territory included within the following limits"; and it proceeds to describe that remaining territory by distinct metes and bounds.

This seems to me to exclude Nipissing from the category of "such part or parts of the said Province, not being within the constituted limits of any district or county, as the said Governor may define and declare." This, as I understand it, means "define and declare" by proclamation for the purposes of that Act.

If this be right, it follows that ch. 101, Consol. Stat., C., does not apply to the "Temporary Judicial District of Nipissing," which has its constituted limits defined, declared and described by statute in the same manner as the other districts and counties of the Province. It has "constituted limits," and is, therefore, not a part of the Province, "not being within the constituted limits of any district or county," and comes not within ch. 101 Consol. Stat., C., but ch. 128, Consol. Stat., U. C., which applies to temporary and provisional districts.

The Justices of the Peace, then, whose conviction is appealed from, are not Justices of the Peace appointed under the Act, ch. 101, Consol. Stat. C., nor do their commissions, according to the form of commission exhibited to the Court on the argument, purport to be under that statute. Then the 4th section, which alone provides for the appeal therein meant, and as it is in this case claimed, does not apply to the Temporary Judicial District of Nipissing, and therefore not to the conviction in question; and as it does not appear that any special provision exists for an appeal from such a conviction to a Court of General Quarter Sessions of the Peace having its sittings outside of Nipissing, no appeal

ies in this case to the sessions of the county of Renfrew. This is the only conclusion at which, upon the best consideration I am able to give the matter, I can arrive; but the subject is beset with difficulties of a serious character, the statutes are rather confusing, and I repeat that I am not over confident of the soundness of my view.

The second question, propounded and argued with much skill and ability on both sides, involves the "constitutionality" of a statute of the Legislature of the Province of Ontario. This question presents an inquiry which is pregnant with grave considerations arising from a due appreciation of the serious consequences which may result from an erroneous decision either way. Declaring a statute affecting general and important matters void must involve great responsibility, because interests of greater or less, and probably of very great general importance, are almost sure to be injured. Hence Mr. Justice Cooley, in his able and well considered Treatise on Constitutional Limitations, aptly observes:

"It must be evident to any one that the power to declare a legislative enactment void is one which the Judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can consistently, with a due regard to duty and official oath, decline the responsibility." And he adds:

"In declaring a law unconstitutional, a Court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and they must indirectly overrule the decision of that co-ordinate department. The task is therefore a delicate one, and only to be entered upon with reluctance and hesitation."

But how much more forcibly do such remarks apply to a like proceeding in this country, where the expression "constitutionality of a statute" is the result of a new departure and the creation of a new practice previously unknown to Canadian and British affairs, and to parliamentary and judicial practice, than to the legislative and

judicial system of the United States, where that institution was made a fundamental principle of their constitution, as a result of popular volition.

There, it is a fundamental principle of a new constitution, resulting immediately from the will of the people in a state of revolution. Here, it is merely a new thing engrafted on an old constitution, as a mere outgrowth of circumstances resulting from the necessities of local position in this new world, and of colonial dependence. And for the same reasons the application of the institution is also more difficult and irksome here than it is in the United States.

In the present case the duty cast on the Court is peculiarly onerous and delicate. The Act in question purports to affect peculiar changes and new and essential arrangements in an important, though inferior, branch of the judicial system of the Province.

It was passed, acted upon and put into operation several years ago, and it has continued in operation since, notwithstanding that doubts concerning its validity have always existed and been frequently expressed.

It may easily be imagined, therefore, that important interests of both a public and private nature must be disturbed and affected, in most cases injuriously, if the statute be found destitute of authority and consequently void. It is impossible to calculate the evil results which may be expected to result from the confusion created by so disturbing a cause.

But, on the other hand, allowing matters to continue and proceed under such a statute can lead only to a greater accumulation of evil results and more disastrous consequences; for sooner or later the statute is sure to be brought to the crucial test, be the consequences what they may.

It is the privilege of every man to insist that his rights and interests shall be regulated by laws of undoubted validity. The sooner then a statute, which is seriously believed by many, and especially by a considerable portion of the legal profession, to be unconstitutional, is authorita-

tively pronounced upon the better. The public interest requires that proceedings under such a statute should be stayed, if it be void; or, if possessed of the authority it purports to have, it is necessary, or at least advisable, that doubts respecting it should be set at rest by a declaration of the proper tribunal, clothed with the necessary authority.

Impressed with this view of the subject, I proceed to the consideration of the second question raised and awaiting decision.

The Judge of the County Court is, by an old statute, which does not appear to have been repealed, Chairman of the Court of General Quarter Sessions of the Peace in the county for which he is commissioned; and this is imperative: Consol. Stat. U. C. ch. 17, sec. 5, and the original statute there referred to; and see also sec. 6, ch. 44, R. S. O., which is precisely the same. The Judges were appointed by the Governor-in-Council.

Section 96 of the British North America Act provides that "The Governor-General shall appoint the Judges of the Superior, District, and County Courts."

Section 1, ch. 15, Consol. Stat. of U. C. provides: "There shall be in every county, or union of counties, in Upper Canada, a Court of law and record to be styled the County Court of the county of _____, or united counties of _____, (as the case may be);"

Section 2 of the same Act provides: "The Governor shall, from time to time, appoint under the great seal, one person or two persons, being a barrister or barristers, of at least five years' standing at the Bar of Upper Canada, to be the Judge or Junior Judge in each of the said Courts."

The Judge is therefore appointed under the great seal to be and he is the Judge in the County Court of the particular county; and by section 5, he "shall reside within the county for which he is appointed." Section 7, referring to the Judge, Junior Judge, &c., of the County Court, uses the expression, "within his county." Section 8 gives the form of oath the Judge is to take, wherein he swears that

he will truly and faithfully, &c., "execute the several duties, powers and trusts of Judge of the County Court of the county of ."

It is, then, abundantly evident that the Judge, Junior Judge, &c., is appointed for a particular county, and for one county only; he must reside therein, and his oath of office applies to that and no other county. But, as already stated, the Judge of the County Court of the county "shall preside as Chairman at the General Quarter Sessions of the Peace for the county; but in case of the absence from sickness, or other unavoidable cause, of the Judge of the County Court, and of the Junior and Deputy Judge thereof, *the justices present shall elect another Chairman pro tempore.*"

Sec. 8 of ch. 44, R. S. O., omits the latter part of the foregoing clause of the consolidated statutes, which provides for the election of a chairman *pro tem.*, and provides that: "Wherever, from illness or from other casualty, the Judge who is to hold the sittings of the General Sessions of the Peace, is unable to hold the same at the time appointed therefor, the sheriff of the county * * may adjourn, by his proclamation, the said Court * * from day to day, until the Judge is able to hold such Court, or until he (the sheriff) receives other directions from the Judge or Provincial Secretary."

The consolidated statute uses the expression, "General Quarter Sessions of the Peace," and in the Ontario Act it is the "General Sessions of the Peace;" but I presume both expressions refer to, and mean the same thing. Both statutes seem clearly to enact that the Judge, or Junior Judge, &c., shall preside as chairman of the Quarter Sessions; in fact, the duty of so presiding is attached to the office, and to the individual only as the incumbent of the office. Then, if the Provincial Legislature has no power, as I hold it has not, to appoint a County Court Judge, or to give him power or authority as such, neither has it, in my opinion, power to authorize a County Judge to preside at the Quarter Sessions of a county other than that for

which he is appointed by the Governor General; for that authority is inherent in and a function of the office of the Judge of that other county, which that Judge is sworn to perform. In fact, to hold otherwise would be to hold that a Provincial statute may authorize a class of persons to act as County Court Judges in counties for which they have never been appointed as such by the Governor General, and therefore to act as County Court Judges without having been appointed as such. But the exclusive right to appoint the Judges is reserved to and vested in the government of the Dominion, and even the Parliament of the Dominion cannot divest the Government of that power, for it cannot so change the British North America Act.

The Provincial Legislature has, then, no power or authority to authorize or make such appointments. It is true that the Ontario Act does not purport directly to make or authorize such appointments, but it attempts to do so indirectly, by assuming to clothe the Judge of a County Court, who has been duly appointed for that county, with the powers and authority of a Judge of the County Court in other counties, which are not included in his commission as united counties. But the Legislature cannot do indirectly that which it is precluded from and has no power to do directly.

It was suggested on the argument by counsel for the Province, that the effect of the Act in question was merely that it appointed a certain person designated by the name of his office who was to preside at the Quarter Sessions, and that the legislature had power to do this. I cannot accept this suggestion as a valid argument; it begs the question rather than establishes the proposition. The Provincial Legislature may, I presume, alter and change the constitution of the County Court and of the Quarter Sessions, as it has altered the constitution of the Superior Courts, but it cannot appoint or authorize the appointment of the Judges of those Courts. By the clause of the B. N. A. Act, already cited, the appointment of the Judges is vested in the Dominion Government.

But besides this, it must be observed that by the 9th section the Executive Government of and over Canada is continued and vested in the Queen.

The Queen is neither part nor branch of the Provincial Legislature, but she is of the Dominion Parliament.

The Dominion of Canada is the larger and more general organization, and its executive has, by section 12 of the B. N. A., or Constitutional Act, all the powers which the Province had at the time of the Union, "as far as the same continue in existence and are capable of being exercised after the Union;" that is to say, its powers are as nearly like and as extensive as are those of the executive of the United Kingdom, as the powers of a colony may be in its relations to the parent state.

The Province is within the Dominion, is part thereof, and therefore narrower and necessarily subordinate in position and extent of authority; and accordingly, after providing and constituting the Provincial Executive Government, the Act, by its 65th section, provides that the powers of its executive are those of the late Province, "as far as the same are capable of being exercised after the Union in relation to the Government of the Province."

It is remarkable that the words, "as far as the same continue in existence," which are in the 12th section, are omitted from the 65th section. Of the precise effect of this omission I am not prepared to speak with confidence; but I think it indicates that some powers continued to exist in relation to the Dominion and were vested therein, but which did not continue to exist in relation to the Province—that, in short, all the former powers continued to and were vested in the Dominion, as far as they could be exercised, but that the Province took only such powers, being part of those continuing to exist, as were suitable to its position, legislative powers and needs required in relation to the Dominion and its Government.

The Governor-General is the direct representative of the Queen, her only representative in Canada, holds his com-

immediately from Her Majesty, and exercises the powers of the Executive of the Dominion, inferior to the powers of the Imperial Government, but to those of the Provincial Government.

Therefore, exercises all the executive power which is in Her Majesty by the Act, and the prerogative of the Crown to the fullest extent that they are of being exercised in relation to the Dominion; to the fullest that is consistent with colonial policy, for that is the effect of his commission and instructions. The Queen is the foundation of justice. It is, in the theory of the constitution, as it was always in fact, administered by the Crown; that is, by the King in person, in his *Aula Regia*.

No person can administer justice but by the authority in the name of the Queen.

She therefore, appoints the Judges or Justices, who administer justice in her Courts.

In Canada the Governor, who alone represents her there, appoints the Judges in her name, under the advice of his

Criminal law is a branch of that justice which can only be administered in Her Majesty's name only, by Justices commissioned by her for that purpose.

A limited portion of the criminal law is administered in the Court of General Quarter Sessions, and it seems impossible to escape the conclusion that the persons who administer it there must be commissioned thereto by Her Majesty. This position is strongly fortified by the fact that the executive power over the criminal law, and of criminal procedure in the Courts, is vested exclusively in the parliament of the Dominion.

A full consideration of the whole matter properly regarded in the light of the Constitutional principles leads inevitably to the conclusion that all persons who administer the criminal laws, which is the branch in question in the present case, by whatever name they may be designated, must be commissioned by the Crown for that purpose; and in Canada that means by the Government of the Dominion.

To make the matter clearer, it may be as well to examine somewhat more in detail the composition of the Executive of the Province. Section 58 of the Act provides that an officer, to be styled the Lieutenant Governor, shall be appointed by the Governor General in Council, by instrument under the Great Seal of Canada.

Section 63 provides that: "The Executive Council of Ontario * * shall be composed of such persons as the Lieutenant-Governor, from time to time, thinks fit; and in the first instance of the following officers, namely, the Attorney-General, the Secretary and Registrar of the Province," &c.

These form the Government of the Province with the powers mentioned in section 65, already referred to.

Of this Government neither the Queen nor her representative is a part. It is composed merely of "officers," of whom the Lieutenant-Governor is an officer of the Dominion, appointed by the Governor-General. This distinction is a marked one, which seems in itself clearly to exclude from the Provincial Government the exercise of the Crown's prerogative, and the statutory powers reserved to the Crown in relation to the administration of justice in Canada. This seems to have been the opinion of the late Chief Justice Harrison, as cautiously indicated in *Regina v. Amer*, 42 U. C. R. 391, and I am aware that it in a measure conflicts with a *obiter dictum* expressed in the same case by the present Chief Justice of this Court; but the question has undergone much discussion and consideration whereby additional and clearer light has been cast on the subject since then.

It only remains now to examine, more fully than I have already done, and compare the legislative powers of the Parliament of the Dominion and of the Legislature of the Province in relation to the administration of justice.

Section 91 of the constitutional Act provides that "it shall be lawful for the Queen, by and with the consent." &c., to make laws for the peace, order, and good government of Canada, in relation to all matters not coming

within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say :

“ 27. The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.”

The Parliament of Canada, then, has power “to make laws for the peace, order, and good government of Canada” in relation to all matters, &c. Then observe the force of the words, “and for greater certainty, but not so as to restrict the generality of the foregoing terms,” &c.

The expression, “The Criminal Law,” in subsec. 27, must be read with reference to the expression “for the peace, order, and good government of Canada,” in the principal clause.

Then it is necessary to observe the force of the concluding paragraph of the same clause : “And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a *local or private nature* comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.”

Section 92 provides :

“In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say :

“ 14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts.”

"16. Generally all matters of a merely local or private nature in the Province." These words of "a local or private nature," repeated here and emphasized by the adverb "merely," make the limitation of the power of the Provincial Legislature to such matters clear and precise. Its power is undoubtedly, then, subordinate to that of the Parliament of Canada, and in no respect are their powers co-ordinate.

Then, as regards the criminal law, it stands thus between the Parliament of Canada and the Legislature of the Province. The Provincial Legislature has the exclusive right to make laws for the constitution, maintenance, and organization of the Courts; the Parliament of Canada has the exclusive control of the criminal law, and of the procedure in criminal matters.

Then, besides the constitution of the Courts, the appointment of the Judges and the procedure in criminal matters, there is a residue, called the administration of justice, which is assigned exclusively to the Legislature of the Province.

It does not include, but excludes the appointment of Judges and the criminal law and procedure, but it includes the administration of justice in other respects, and the constitution of the Courts in all respects, except as to the person who administers justice therein. The criminal law and procedure, and the appointment of the Judges, are carefully excluded from the legislative control of the Province. In short, the Legislature of the Province possesses only *enumerated* powers of a local and a private nature conferred on it; but the Parliament of Canada possesses the general powers of legislation necessary for the peace, order, and good government of Canada, only part of which is *enumerated*.

I therefore conclude that the Legislature of the Province has no power, by Act or otherwise, to confer on any person authority to preside at the Quarter Sessions in any county to administer the criminal law therein, instead of the Judge or Junior Judge, &c., of the County Court of that

county; and it makes no difference, I think, that such person is the County Judge of another county. The Act in question is therefore not within the competency of the Provincial Legislature, and is void.

Prohibition granted.

NOTE.—The Ontario statute referred to, *ante* p. 415, is 39 Vic. ch. 14, (R. S. O. ch. 42, sec. 16, *et seq.*)

[QUEEN'S BENCH DIVISION.]

IN RE WORKMAN AND THE CORPORATION OF THE TOWN
OF LINDSAY.

Drainage by-law—Use of sewer without leave—Validity of by-law.

A municipal corporation passed a by-law for the construction of a sewer without limiting the purposes for which it was to be used, and subsequently passed another by-law regulating how it might be tapped for drainage purposes, and enacting that no one should drain into it without permission from the municipal council first obtained, and specifying a certain rate of payment for the use of it when so permitted. The applicant got no leave from the council or any committee thereof to use the sewer, but several members of the council gave him permission to connect some waterclosets with it on condition of his paying, whenever called upon, whatever was reasonable for the privilege: *Held*, that the sewer was constructed for general drainage purposes, including that of waterclosets; but that the permission given to the applicant so to use it did not bind the council, which could compel him to cut off the connection, as he had not obtained their consent to make the same, nor paid the rate fixed by the by-law; and that the fact of his having enjoyed the privilege for several years did not place him in any better position than he was at the first.

Semble, that even if he had the legal right to use the sewer, either the corporation or the local board of health could, upon the facts stated below, under 47 Vic. ch. 32, sec. 13, and ch. 38, sec. 12, have passed a by-law compelling him to cut off his connection.

Quære, whether after the formation of the local board of health the by-laws provided for by 47 Vic. ch. 32, sec. 13, should be passed by the corporation or by the board of health under ch. 38, sec. 12. The motion to quash the by-law was therefore refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation.

THIS was a motion by Hudspeth, Q. C., to quash by-law 414 of the town of Lindsay, prohibiting all persons making connections with the main sewer of that town.

The motion was based upon two grounds :

1. That the By-law was *ultra vires* the council.
2. If not *ultra vires* as against the public, it was so as against the applicant.

The by-law in question enacted that no person should have on his premises a watercloset connecting with the main sewer, or any duct or pipe or other thing through which offensive matter could be conveyed into said sewer. It was also further enacted that this by-law should form part of the several by-laws relating to the preservation of the public health, and that any infringement thereof should render parties so offending liable to the penalties laid down in said by-law. And it was further enacted that the Sanitary Inspector should be at once instructed to see that the by-law received full force and effect at the earliest possible date.

December 5, 1884. *Aylesworth and Martin* (of Lindsay) shewed cause.

The facts appear in the judgment.

January 20, 1885. ROSE, J.—A brief reference to the facts will, I think, remove most of the difficulties in this case.

In August, 1873, what may be called the construction by-law was passed, No. 202. It provided for the construction of a brick sewer, according to certain plans and specifications, at a cost of \$5,350.

The purposes for which it was to be used were not limited.

It appears to have been built sufficiently large to enable a man to go up it wheeling a barrow, and was built in two of the main streets, or thoroughfares of the town.

On the 20th of April, 1874, by-law, No. 217½, was passed, "to regulate the manner and the circumstances under which persons may tap the main sewer on Kent street for purposes of drainage."

It recites the construction at a large cost to the rate-payers generally ; the expediency of its being "utilized for purposes of drainage by persons who occupy a frontage on said street, and others who may wish to run drains from private property into said sewer ;" and enacts (1) that no one shall run a drain into the sewer unless he first obtain permission of the municipal council to do so ; (2) that the connecting drains shall be of brick, tile or dressed stone, and not less than thirty-six square inches measurement ; (3) mode of construction, removal of earth, &c. ; (4) power to council to delegate its authority as to granting permission to excavate the public street to the street and bridge committee for the time being ; (5) that seventy-five cents per foot frontage shall be the rate payable for the privilege of using the sewer.

It will be observed that the power of delegation was only as to permission to excavate, and not as to permission to use the sewer. I confess a little difficulty in understanding exactly what this means, but in the view I have taken it does not become material.

The applicant never obtained the permission of the council to use the drain, nor of the committee to excavate.

In 1879, it appears, as put in the affidavit of George Crandall, then and now a member of the town council, that he "and other members of the council, at that time representing the said corporation of the town of Lindsay, gave permission to the said Workman to connect his said water-closets with the sewer above referred to, upon condition that he would pay whatever was reasonable when called upon to do so."

It is clear that in giving such permission they were not acting under the by-law, and in no sense bound the council ; indeed, the provision as to reasonable payment must have been made in forgetfulness of the express provision of the by-law, declaring a fixed rate per foot frontage.

Thereupon, Workman, in good faith I have no doubt, and relying on such permission, as I have also no doubt, built water-closets in his hotel at considerable expense, and

connected them with the sewer by, as would appear from the affidavit of one Dr. Burrows, the then most modern and approved system of pipes, traps, &c.

I am of the opinion, on the evidence, after considering the wording of the by-laws, that the sewer was constructed for general drainage purposes, including drainage of water-closets.

It seems to me that the council, immediately upon the completion of the work by the applicant, could have compelled him to cut off the connections, for he clearly had not complied with the provisions of by-law No. 217½ in obtaining the requisite consent, nor did he pay the front-age rate provided by such by-law.

As the council must act by by-law, I am unable to say that notice to each member of the council personally would have rendered unnecessary the formal consent of the council. That body should meet together and consult, and the consent should be their action after deliberation. But even if such notice were sufficient, I do not find as a fact that it was given, or more than that certain members of the council out of council took it upon themselves to give such consent.

I have difficulty in seeing how the enjoyment of the privilege thus obtained for a term of years gives any greater right than Workman had at first. I think it does not, and that he has used the sewer for the past five years without legal right, and that without the passing of any by-law the council could have required him to cease from so using it.

It appears without doubt that the sewer was so constructed that without increasing its fall either for the whole or a portion of its length, and providing for flushing it, and probably continuing it so as to run its mouth into the river, further use of it as a receptacle of excrement from water closets will prove most dangerous to the health of the inhabitants of the town.

The affidavits of Dr. Burrows filed, one by Workman, and one by the town, clearly shew this.

The sewer, if used for such purposes in its present condition, will become a mere receptacle or cesspool, and not a conduit pipe, and clearly should not be further used without some alterations such as suggested, or others which scientific men can devise.

Had I found that Workman had the legal right to use the sewer, I would have difficulty in finding that on the facts here presented the municipality or the local board of health could not have passed a by-law requiring the connections with the sewer to be cut off.

The powers conferred upon municipal councils by 47 Vic. ch. 32, sec. 13, and upon local boards of health by 47 Vic. ch. 38, sec. 12, are very wide, and it would require a very clear case of excess of authority to enable the Court to interfere with the exercise of their discretion. It is not necessary to say whether any case could be presented to warrant the Court substituting its discretion for the discretion vested in such bodies.

It is said that this by-law was passed at the request of the local board of health. It was not discussed before me as to whether after the formation of the local board of health the by-laws provided for by 47 Vic. ch. 32, sec. 13, should be passed by the municipal council or by the local board of health under 47 Vic. ch. 38, sec. 12, and I do not express any opinion upon it. Care should be taken to consider this question in future proceedings.

I do not find it necessary to consider such a question for a further reason, viz: I think there is no one interested in raising it, as it appears that no one has obtained permission to connect water-closets with the sewer, and only the applicant and the Bank of Montreal have done so without permission. As against the public, therefore, who have not made such connections, and as against Workman and the Bank of Montreal, the by-law may, as to its first clause, be read as a declaration by the council that for the future no consent will be given to connect under by-law 217½ thus leaving parties open to any proceedings that the law may provide for depositing filth in places where it may prove noxious to public health.

What the further clauses of by-law 414 may mean counsel did not suggest, and I have not endeavored to ascertain. The question discussed was, as to the right of the municipality to compel Workman to disconnect the pipes of the water-closets in his hotel from the sewer. I think they have such right, and that this motion fails.

As, in my opinion, Workman has been led into his present position by the indiscretion of certain of the members of the municipal council of 1879, and will suffer much loss and expense in consequence of the municipality not providing proper drainage, I do not think I should add to such loss and expense the costs of this motion.

Motion refused, without costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. LACKIE.

Fraudulent removal of goods—11 Geo. II. ch. 19, sec. 4—Defendant compelled to testify.

The fraudulent removal of goods, under 11 Geo. II. ch. 19, sec. 4, is a crime, and a conviction therefor was consequently quashed, with costs against the landlord, because the defendant had been compelled to give evidence on the prosecution.

January 13th, 1885. This was a motion, by *Shepley*, to quash a conviction or order of justices under 11 Geo. II. cap. 19, s. 4, the offence charged being fraudulent removal of goods to prevent the landlord from distraining same for arrears of rent reserved.

Watson and Edmison, contra.

The arguments and cases cited are referred to in the judgment.

January 15, 1885. ROSE, J.—Several grounds were taken on the argument of this motion, but in the view I take it will be necessary to consider only the question of the defendant being compelled to give evidence. Mr. Shepley contended that the offence charged was a crime, and hence that the defendant was wrongfully compelled to give evidence against himself, and that the conviction must be quashed on that ground.

Many cases were cited. Most of them have been considered in *Regina v. Roddy*, 41 U. C. R. 291; *Re Lucas and McGlashan*, 29 U. C. R. 81. I have referred to the other cases cited and other authorities, which I will note at the conclusion of my opinion.

I forbear attempting to give a definition of a crime. Many have been given, some of which, while in terms apparently general, were evidently framed with a view of covering the particular facts under consideration, and are

therefore more limited than according to other definitions they should be. I will content myself with stating the reasons for the opinion I have formed, that this particular offence is a crime, or, what perhaps amounts to the same thing, that the sum equal to the double value of the goods which the justices may order the defendant to pay is a penalty or penal sum.

The recital in the statute is as follows: "Whereas the several laws heretofore made for the better security of rents, *and to prevent frauds* committed by tenants, have not proved sufficient to obtain the good ends and purposes designed thereby, but rather the *fraudulent practices* of tenants have of late years increased to the great loss and damage of their lessors or landlords.

For remedy whereof be it enacted that * * in case any tenant * * shall fraudulently or clandestinely convey away or carry off or from such premises his, her or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same." * *

Then follow provisions for following the goods, provisions for punishing any person or persons who may assist, by making "all *and every* person and persons so offending *forfeit* and pay to the landlord * * double the value of the goods by him, her or them respectively carried off or concealed as aforesaid, to be recovered by action of debt." The marginal note in *Chitty's Statutes*, Vol. 3 p. 1279, to this section is, "Penalty on the said fraud or assisting thereto."

Then follows the section in question: "Provided always, * * that where the goods so fraudulently carried off or concealed shall not exceed the value of £50," the landlord or his bailiff, servant or agent may "*exhibit a complaint* in writing" before two or more justices of the peace, who are empowered to *summon* the parties concerned, "and in a *summary way* determine whether such person or persons be guilty of the offence with which he or they are charged, * * and upon full proof of the *offence* * * may and shall *adjudge* the offender or offenders to pay double the value

of the said goods and chattels to such landlord or landlords, his, her, or their bailiff, servant, or agent, at such time as the said justices shall appoint ;” and in case of neglect or refusal the justices may order distress, and for want of distress imprisonment, “there to be kept to hard labour without bail or mainprize, for the space of six months *’ unless the money so ordered to be paid as aforesaid shall be sooner satisfied.”

By the 5th section an appeal is given to the Quarter Sessions.

When it is noted that the amount to be paid is in no sense regulated by the amount of rent due or payable, but becomes a fixed arbitrary sum determined by being double the value of the goods: that the statute does not say, and no case was cited deciding, that the payment of such sum was in satisfaction or payment in full or *pro tanto* of the rent; further, that the payment is enforceable by distress and imprisonment at hard labour, and an appeal given to the Quarter Sessions ;—I cannot doubt that the Legislature intended not to provide a summary means of recovery of a debt, but intended to punish fraudulent practices, so as to deter others from the commission of them, as indeed it seems to me the recital shews.

It will be observed that a bailiff or agent may prosecute, and that the money may be ordered to be paid to such bailiff or agent. I do not know whether it has been or could successfully be contended that such payment was a payment not to them for the landlord, but as prosecutors. It might be urged that the penalty was given those who probably would prosecute, or perhaps that bailiffs or agents representing absentee landlords were, for the convenience of the landlords, allowed and named to act in their stead. I have not looked for any authority on the point, and further consideration may cause it to disappear.

When one turns to our Evidence Act, R. S. O. ch. 62, and finds that in civil proceedings no one is compelled to answer any question tending to criminate himself, or to subject him to prosecution for any penalty, it is hardly

arguable that in proceedings to recover a penalty the defendant is a compellable witness.

Much reliance was placed by counsel for the prosecution on the fact that the statute spoke of an "order," and not "conviction."

In *Burn's Justice of the Peace*, vol. 5, p. 1159, it is said that since the case of *Rex v. Hulcott*, 6 T. R. 583, it is doubted whether any intelligible distinction can be said to exist between an order and a conviction, and it is advised that the order be drawn up with all the strictness of a conviction.

Mr. Paley, in his work on Summary Convictions, 6th ed., p. 174, says that "the language of that Act (11 Geo. ii., ch. 19, sec. 4) certainly seems to point out a proceeding altogether similar to that which is understood by a summary conviction, and there can be little doubt that it would be regular in this form, of which there exist many precedents."

The question as to what is a crime was considered in *Peek v. Shields*, 31 C. P. 112, 6 A. R. 639, 8 S. C. 579; *Doyle v. Bell*, in Appeal, but not yet reported. Reference may be had to *Paley*, 6th ed., pp. 111, 112, 118, 119, 171, 182, 244, 246, 247; *Russell on Crimes*, 5th ed., p. 194; *Woodfall's Landlord and Tenant*, 12th ed., pp. 435, 436, 438; *Attorney General v. Radloff*, 10 Ex. 85; *Regina v. Fuller*, 2 D. & L. 98; *Rex v. Cheshire*, 5 B. & A. 439; *Coster v. Wilson*, 3 M. & W. 411.

For these reasons I must give effect to the motion, and quash the conviction.

I think the landlord must pay the costs, as he was willing to secure the advantage of a pretty severe penalty.

Conviction quashed, with costs.

[QUEEN'S BENCH DIVISION.]

BRICE V. MUNRO.

*Action for unpaid shares—Foreign company—40 Vic. ch. 43, sec. 47 (D)—
Non-issue of execution in Ontario—Pleading.*

In an action by a creditor of the Morton Dairy Company, (limited), against defendants, to recover the amount of unpaid shares in that company, under 40 Vic. ch. 43, sec. 47, (D), the head office of the company being in Quebec, where the plaintiff's judgment against the company had been obtained and execution returned thereon unsatisfied, a demurrer to the statement of claim was allowed, because it did not appear that an execution in Ontario against the company had been returned unsatisfied.

IN this action the plaintiff claimed to recover from the defendant an amount of unpaid shares in the Morton Dairy Company (Limited), under 40 Vic. ch. 43, sec. 47 (D.). The head office of the company was in the Province of Quebec, and the judgment was obtained in the Courts of that Province, and execution returned thereon unsatisfied.

The defendant demurred, and stated the ground to be: "That it does not appear that an execution in the Province of Ontario against the said company to levy the plaintiff's claim against the said company, has been returned unsatisfied in whole or in part."

The question raised was, whether the section above referred to requires an execution to be returned in the Province where the action is brought against the shareholder, or whether an execution upon a judgment in any Province of the Dominion or elsewhere satisfies the statute.

Shepley, for the demurrer.

Lash, Q. C., contra.

The arguments appear in the judgment.

January 23, 1885. ROSE, J.—The words of the statute are: "Every shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not

paid up thereon; but shall not be liable to an action therefor by any creditor before an execution against the company has been returned unsatisfied in whole or in part."

It is contended by the plaintiff that having sued the company in Quebec, and having an execution in that Province returned unsatisfied, he has literally satisfied the words of the statute.

He further contended that an action would not lie in the Courts of the Province against the company, as none of the grounds for allowance of service out of Ontario under Rule 46, O. J. Act, existed; and that whether such grounds existed in this case or not, the fact that they might not exist in some cases shewed that the Legislature never intended to require an action which in some cases could not be brought.

It was not contended that an execution obtained out of the Dominion would satisfy the words of the statute, but that as the Act was a Dominion Act, the territorial limitation must be the Dominion.

On the other hand, it was contended that the Act being a Dominion Act, and providing for judgment against the company, gave jurisdiction to the Provincial Courts to entertain an action against the company, as no Dominion Court existed in which such action could be brought: that therefore, if it was necessary to obtain judgment against the company in any Province in order to support proceedings against shareholders in that Province, the Courts of that Province were empowered to entertain the action in which judgment was to be obtained without regard to where the head office of the company might be.

When the provisions of the Act as to service (sec. 61) are referred to, it seems clear that it is not necessary to invoke the aid of rule 46 to obtain an allowance of service.

It is clear a foreign corporation may be sued in England, even if it have no residence there: see *Westman v. Aktiebolaget*, 1 Ex. D. 239, referred to in *Langton's MacLennan*, p. 188. The only question is as to service; for unless the Court limits its own jurisdiction it may enter-

tain the action, although the judgment may avail little or nothing. See remarks of Bramwell, B., S. C., p. 240 Rule 42, Ontario Judicature Act, provides that, "Where by any statute provision is made for service of any writ of summons, bill, petition or other process upon any corporation * * every writ of summons may be served in the manner so provided." And by rule 47 it is provided that the preceding rules as to allowing service "are not intended to interfere with or affect the powers of the High Court, or a Judge thereof, in the exercise of the jurisdiction heretofore possessed by any or either of the Courts hereby consolidated, to direct, on application in that behalf, that service in any other manner may be good service, or that the time for defending shall be other than the time above named, or to give any special or other direction as respects proceeding against a defendant out of Ontario."

Mr. Lash also contended that as the amount due upon the stock is spoken of in the cases as part of the assets of the company, sub-sec. (e) of Rule 45 might be invoked, if necessary. I express no opinion as to this, but have no doubt that the Courts of this Province have jurisdiction to entertain an action against a joint stock company incorporated under "The Canada Joint Stock Companies Act, 1877," wherever the head office may be, and that service made according to the provisions of sec. 61 would be good service without further allowance, and therefore that no ground of supporting the demurrer can be found in such objection.

When this case came before me on appeal from the order of the learned Master striking out the demurrer as frivolous, I pointed out in the judgment I then delivered that no case was to be found expressly deciding the point here raised. I need not repeat what I then said. It is evident that no such question could arise in England, as proceedings by *scire facias* being the only mode of procedure adopted such writ could only issue on a judgment of one of the Courts in England.

It is clear also that if the proceedings against these

defendants had been by *scire facias* the question here raised could not have arisen, as before such proceedings could have been taken a judgment of one of the Courts of the Province must have been first obtained, and an execution thereon returned unsatisfied in whole or in part.

It was decided in *Gwatkin v. Harrison*, 36 U. C. R. 480, and *Page v. Austin*, 26 C. P. 110, that *scire facias* is the "proper and appropriate" form of action for proceeding against a shareholder. These cases, especially the elaborate judgment of Hagarty, C. J., in *Gwatkin v. Harrison*, where a very large number of cases is reviewed, renders it unnecessary to refer more fully to the law governing proceedings by *scire facias*.

It is contended on the part of the defendant that although the word "action" includes other forms of proceeding than by *scire facias*, the creditor has no further or other rights in an action commenced by an ordinary writ of summons than by *scire facias*. I think this is so. If he has it will follow that where a creditor adopts the "proper and appropriate form of remedy" he must sue the company in this Province, obtain judgment, issue execution thereon, and have the same returned unsatisfied in whole or in part; whereas another creditor who adopts the course of bringing an action commenced by the ordinary writ of summons—being a permitted but not an approved or appropriate form of proceeding—need not take these preliminary steps. It would also follow that he might issue his summons against a shareholder in Ontario, in a company doing business in Ontario, and set out in his statement of claim a judgment recovered, say, in Manitoba, and an unsatisfied execution upon such judgment in Manitoba, and proceed with his action, although the company might have ample assets in Ontario.

It has been held in England, *In re Poltimore*, L. R. 2 C. P. 19, that "Even the return of *nulla bona* will not satisfy the Court. It must be shewn that reasonable efforts have been made to discover property of the company which could be made available to satisfy the judg-

ment." See also *Rigby v. Dublin Trunk Connecting R.W. Co.*, L. R. 2 C. P. 586, where (p. 588) Bovill, C. J., says: "I would by no means say that, if anywhere abroad there were assets of the company sufficient to satisfy the debt, the Court would in its discretion grant a writ of *sci. fa.* against a shareholder"; and *The Ilfracombe R. W. Co. v. Lord Poltimore*, L. R. 3 C. P. 17, to the same effect.

It is easy to discover from these and other decisions why proceedings by *scire facias* are proper and appropriate. The Court should be able to regulate the commencing of such actions, and not permit shareholders to be sued unless it appears that all the assets have been exhausted, or practically so; and especially is this the case with reference to companies trading under a Dominion charter, where they may have assets out of the reach of the Courts of a particular Province in which shareholders are being sued. Proceedings by summons in the ordinary form of action certainly should not receive more encouragement than proceedings by *scire facias*.

I am not forgetting that this decision may involve the apparent absurdity of having to sue in this Province, and recover judgment against the company and issue of an execution when it is known that there are no assets here. The same result would appear if proceedings were commenced by *scire facias*.

It must not be forgotten that a judgment of another Province is a foreign judgment. Difficulties might have arisen at the trial of this action had a demurrer not been lodged. When the plaintiff attempted to prove the judgment and execution questions would have arisen which need not now be discussed.

The demurrer must be allowed, with costs.

Judgment for defendant on demurrer.

[QUEEN'S BENCH DIVISION.]

REGINA V. SMITH.

Patent of invention—35 Vic. ch. 26, (D)—Delivery of model.

Held, that 35 Vic. ch. 26, (D), does not require delivery of a model prior to the issue of a patent of invention.

In this case after the granting of the patent the Commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of the model, which was sent, and the patent was then forwarded :

Semble, that delivery of the model prior to the grant of the patent was dispensed with, merely requiring it to be sent before the patent would be forwarded.

THIS was a proceeding by *sci. fa.* to have declared void certain letters patent for new and useful improvements on methods of and machines for making lacing-hooks for shoes, and to have the same vacated, cancelled, and disallowed, and delivered up to be cancelled, on the grounds:

1. That the defendant did not, before obtaining said patent, deliver, as required by the Patent Acts, to the Commissioner of Patents a model of his invention, though said invention admitted of illustration by means thereof, and the same was not specially dispensed with. 2. That no such model was delivered before said patent was sealed, signed, and registered. 3. That said defendant did not obtain said patent till 30th April, 1880, though dated 13th October, 1879. 4. That said defendant did not by any specifications filed with said commissioner correctly and fully describe the mode of operating said invention, nor clearly state the contrivances claimed as new, and did not explain the principle and mode in which it was intended to work out the same. 5. That said defendant did not by any specification describe the nature of said invention, and how it was to be performed. 6. That it was false that before defendant obtained said patent he had complied with the Patent Act of 1872, as recited in said patent.

The defendant pleaded, in substance, as follows :

1. That said patent issued 13th October, 1879, and that on or about 17th October, 1879, a letter was received by defendant from the Commissioner of Patents that the said patent had been granted, and that it would be forwarded on receipt of a model of the invention: that on 30th April, 1880, said model was delivered by defendant, none having been before delivered, and after said delivery said patent was received by defendant: that failure to deliver or file said model before issue of said patent was not a cause of nullity thereof, and the subsequent compliance with the demand of said commissioner for said model was sufficient, even if necessary (which it was not) to render said patent effectual from the date thereof, and in any event from the date of such compliance.

2. The defendant admitted that on 13th October, 1879, said patent was sealed, signed, and duly registered, and that afterwards, without delivery to said Commissioner of any model, though said invention admitted of illustration by means of said model, the letter in the first plea referred to was received from said commissioner; but that afterwards, on 30th April, 1880, said defendant, for the first time, delivered said model, which was received by said Commissioner without objection and retained, and said patent was thereafter delivered; and that said patent was not null by reason of non-compliance with such formality, and that subsequent compliance cured all defects, and validated said patent from its date, or from the date of such compliance.

3. The defendant admitted that by reason of the facts in the second plea mentioned said patent was not actually delivered by said Commissioner to defendant till 30th April, 1880, though it purported to bear date and take effect from 13th October, 1879; but defendant submitted said patent was valid and effectual from its date, and the failure to deliver said model till 30th April, 1880, was not, under the facts, a cause of nullity, but an irregularity merely, which was cured by the subsequent reception of said model and delivery of said patent.

4. That the model required by the Patent Acts was delivered to and the patent issued and physically delivered by said Commissioner at the time and in the manner in the second plea stated, and unless the non-delivery of said model as aforesaid constituted a failure to comply with the Patent Acts, said defendant did comply therewith before obtaining said patent; and that the delivery of said model at the time and in the manner aforesaid, was not imperative, but directory merely: that, consequently, the recital in the said patent, that said defendant had complied with the requirements of the Patent Act of 1872 before obtaining said patent, was not false within the meaning of said Patent Act and said patent.

To these pleas the Crown demurred.

Gormully, for the demurrer.

W. A. Foster, contra.

The arguments appear in the judgment.

January 23, 1885. ROSE, J.—The questions sought to be raised by the demurrer were four in number.

1. Did the Patent Act require the delivery of a model prior to the issue of letters patent unless dispensed with?

2. If so, could the Commissioner, without formal application and adjudication for good cause shewn, dispense with such delivery?

3. If delivery was requisite, did what was done in this case, as set out in the pleadings, amount to a dispensation under section 15 of the Patent Act?

4. If the statute required delivery prior to issue of the letters patent, was such requirement directory or imperative, and did non-compliance therewith avoid the letters patent?

If I am of the opinion that delivery prior to issue of letters patent is necessary, unless dispensed with, I am asked not to dispose of the case simply on the question as to whether the plea should set up in terms that the applicant was "specially dispensed from" delivering a model to the commissioner "for some good reason," but to express

an opinion whether the pleas set up such facts as constitute a defence, it being admitted that no amendment would avail the defendant, as if necessary to shew a dispensation no other facts than those set up in the plea can be shewn to evidence the same.

I will first consider whether it is necessary to deliver a model prior to issue of letters, unless dispensed with.

By section 1 of the Act Respecting Patents of Inventions, 35 Vic. ch. 26 (D.), the Minister of Agriculture is appointed to be commissioner of patents, and his duty is declared to be "to receive all applications, fees, papers, documents and models for patents."

By section 3 he may make rules and prescribe forms such as may appear to him necessary and expedient for the purposes of the Act; "and all documents executed in conformity with the same, and accepted by the Commissioner, shall be held valid so far as relating to proceedings in the patent office."

By section 6, "Any person having invented any new and useful art * * may, on a petition to that effect," i.e., that he is the patentee, &c., "and on compliance with the other requirements of this Act, obtain a patent."

It is urged that delivery of a model is a requirement of the Act.

By section 11 the inventor "before a patent can be, obtained shall make oath * * that he verily believes that he is * * the inventor * * and that the several allegations in the petition contained are respectively true and correct."

By section 12 he must in his petition mention his elected domicile.

By section 13 he is required to insert in his petition the title or name of the invention, and "shall *with the petition* send in a specification in duplicate."

Section 14 provides as to what the specification shall shew, and that with the specifications, where the case permits, *drawings* in duplicate must be sent.

The commissioner is empowered to require further drawings, or *dispense with any of them, as he may see fit.*

Section 15 provides that "*the applicant shall also deliver to the Commissioner, unless specially dispensed from so doing for some good reason, a neat working model of his invention on a convenient scale, exhibiting its several parts in due proportion, whenever the invention admits of such model.*"

Section 18 provides for examination of the patent by the Minister of Justice, and if he finds it conformable to law he shall certify accordingly, and it will then be signed and the seal affixed thereto, and being duly registered, shall avail to the grantee thereof.

Section 27 enacts that "a patent shall be void if any material allegation in the *petition or declaration* of the applicant be untrue."

Turning to the rules, we find rule 7 providing as to form, &c., of models, but nothing as to delivery.

13. "Drawings in duplicate *to be attached* to the duplicate specification, * * *with each application* an extra drawing is required for the patent office record." * *

Rule 19 provides that "all cases connected with the intricate and multifarious proceedings arising from the working of the patent office, which are not specially defined and provided for in these rules, will be decided in accordance with the merits of each case under the authority of the Commissioner, *and such decision* will be communicated to the interested parties in writing."

The forms provide that the petitioner shall set forth the fact of the invention; that it was not known or used by others before his invention thereof, and that it was not in public use or on sale, &c.

The prayer is for a patent for the invention, "as set forth in the specification in duplicate sent herewith," &c. Nothing is said as to model.

The form of specification refers "to the accompanying drawings," but not in any wise to the model. The drawings refer to the "specifications hereto annexed," but not to the model.

The oath or declaration is a verification of the petition, and makes no reference to the model.

The patent recites the petition, &c., and "that whereas the said Stephen Nelson Smith had also complied with the other requirements of the said Act."

Mr. Gormully contends that this recital is untrue to the knowledge of the patentee, in that the Act requires delivery of a model, which was not done, and therefore that the Crown has been misled by the patentee and the Commissioner into granting the patent, believing it was true, *i. e.*, that a model had been deposited prior to the issue of the patent.

The analysis of the Act, rules, forms, and patent, shews that it is nowhere in express terms declared that the model shall be deposited prior to the issue of the patent. If, therefore, such direction is to be found, it will be by implication. Mr. Gormully urged that the use of the word "applicant" in sec. 15 shews that the model is to be lodged prior to granting of letters, when he would become the patentee; and that as the Act requires delivery of a model, the applicant does not conform to all the requirements of the Act until the model is deposited.

It will be seen that the Act carefully points out what the inventor must set forth in his petition, what he must send with his petition, what he must pledge his oath to; and the rules point out to the applicant that for the use of the patent office record an extra copy of the drawing must be provided. If the contention of counsel for the Crown be correct, one would have expected to find in the rules a direction that the model must be sent down with the petition and drawings, or be lodged in the office before the application would be considered, or some other direction to guide the applicant. On the contrary, while the size, &c., of the model are defined, there is no direction as to time when it must be deposited. We find that while direction is given that drawings must accompany the specifications, the Commissioner is vested with full discretionary power to require more, or dispense with any of them.

It seems to me that if the delivery of a model was intended to be a prerequisite, the non-compliance with which

would avoid the patent, it was due to the public that the statute should in express terms say so, and not be so drawn as to mislead, not only the applicants, but the commissioner himself. Not only does the statute not so declare, but it invests the Commissioner with discretionary power, thus leading the public to suppose that he can say whether or not the delivery of a model must precede the granting of the patent. It is argued that the words, "Every inventor before a patent can be obtained," in section 11, govern sections 12, 13, 14, and 15. This seems to me rather too forced to avail when it is offered for the purpose of taking away a man's property.

I cannot and will not by implication destroy and declare invalid the grant of the Crown, made without any concealment on the part of the patentee, nor will I yield to the request of the applicant, who comes in the name of the Crown, and assume that the commissioner wilfully or negligently issued a void patent. Of course the Courts must yield to the plain wording of any statute, no matter whether a decision founded upon such statute work injustice or result in a gross absurdity; but it must be a clear declaration of the statute which will enable a rival claimant of an invention to have the patent of the Crown declared void on such a ground as here taken.

I am of the opinion, for the reasons above given, that the statute does not require delivery of a model prior to the issue of a patent. I have no doubt that the Commissioner may require such prior delivery; in other words, I am of the opinion that while the delivery of a model, unless dispensed with, is imperative, the time of delivery is left to the discretion of the Commissioner.

In this view it does not become necessary to answer the second question, and I prefer not to attempt to define what the statute has not defined, or to lay down rules which the Commissioner has not thought best to make for his own guidance. It may be that Rule 19 covers the case. Whether it does or not the discretion is given to the Commissioner, and it would require a very clear case to warrant any

interference with such discretion. I do not say that the Courts have the power to interfere: when the question arises it can be determined.

As to the third question. It appears that after the patent had been granted the Commissioner wrote to the applicant advising of the grant, "and that the same" (*i.e.*, the letters themselves) "will be forwarded on receipt of a model of the invention." Subsequently, some months after, the model was sent, and the letters forwarded.

If necessary to uphold the validity of this patent, I think I should be prepared to hold that the Commissioner dispensed with the delivery of the model prior to the granting of the letters patent, and required the applicant to furnish the model before the letters were forwarded to him; but I have not found it necessary to carefully consider such question.

As to the fourth question, much might be said in favour of Mr. Foster's argument, that, as the statute has declared patents void for non-compliance with certain requirements, but has not declared them to be void for non-compliance with this, the provision as to delivering the model is only directory. I desire not to express an opinion on this question, as in the view I have taken it has become unnecessary.

The result is, that the demurrer must be overruled, with costs in the cause to the defendant in any event.

Judgment for defendant on demurrer, with costs.

RE STANDARD FIRE INSURANCE COMPANY.

CHISHOLM'S CASE.

TURNER'S CASE.

FINDLAY'S CASE.

BARBER'S CASE.

COPP, CLARK & CO.'S CASE.

CASTON'S CASE.

Winding up proceedings—Contributories.

Appeal from Master's report, which placed certain parties on the list of stockholders as contributories to the extent of their unpaid stock.

CHISHOLM'S CASE.—C. having been communicated with by the president of the company agreed to act as a director, and gave his note for \$500, in order to obtain a qualification. The president subscribed for 50 shares stock for him, on which the \$500 would pay ten per cent. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on 50 shares, and he at once communicated with the president, who told him not to mind, and that the secretary would be instructed, and he was not troubled again about it. At this time his note had been carried by the company, and he had paid nothing. The president then absconded, and he was notified of a five per cent. call, and gave a note for \$250 in payment of same, not (as he alleged) because he was liable, but because he was told that would settle his total liability, and he did not wish to enter into a suit.

Held, that he was properly placed on the list of contributories.

TURNER'S CASE.—T. signed a power of attorney to C. to subscribe for 20 shares of stock, and delivered it to him *on the understanding that it was not to be used except he became a director of the company*. C. directed the accountant to enter T.'s name in the stock ledger as a stockholder, which was done. Blotting pads were issued, and an advertisement published in a newspaper, and a return made to the Government, with T.'s name inserted as a director in the two former, and as a member in the latter; but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement, or returns, and that he did not know his name was in any of them; and on receipt of a notice claiming a five per cent. call, he at once repudiated all liability. *Held*, that the stipulation that he was to be a director was a condition precedent to his becoming liable as a shareholder, and that T.'s name must be removed from the list of contributories.

BARBER'S CASE.—B. signed a power of attorney to subscribe for stock under the same circumstances as Turner, but was asked by letter to fix the time to suit himself to pay the ten per cent. call, and he added to the power a clause that "the ten per cent. was to be payable in one

year from date." He was also notified by the secretary of the company that he was a shareholder, and a notice of a meeting was sent to him. There was no evidence to shew that he made the formation of the board a condition precedent to his becoming a shareholder.

Held, that the entry by the accountant of B.'s name as a stockholder was equivalent to an entry by C., to whom the power was given, and was no delegation of any discretionary power, but a mere ministerial act.

Held, also, following *National Insurance Co. v. Egleston*, 29 Gr. 406, that it was not material that the name was not entered in the subscription book, nor that there was no specific allotment of stock; and that B. was properly placed on the list.

COPP, CLARK & CO.'S CASE.—This case was somewhat similar to Barber's case, but there was an understanding that the calls were to be paid in work, and \$100 worth of work was so done and credited in the books of the company; and C., C. & Co. printed the pads, saw the advertisement in the paper, and received notices of the calls.

Held, that they were contributories.

CASTON'S CASE.—C. signed the power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock, but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years; and he was appointed solicitor under the seal of the company, received notices of meetings and calls, and did not expressly repudiate his liability.

Held, that he was properly made a contributory.

THIS was an appeal from the report of the Master at Hamilton by R. K. Chisholm, John Turner, William Findlay, Robert Barber, Messrs. Copp, Clarke & Co., and H. E. Caston.

The Alliance Insurance Company was incorporated by 38 Vic. c. 66 (O.) and was amalgamated with the Standard Fire Insurance Company by 46 Vic. c. 58 (O.) which provided in sec. 2, "and the shareholders of the said companies, together with such persons and corporations as shall under the provisions of this Act become shareholders in the new company, are hereby created, constituted, and declared to be a body corporate and politic, under the name of the Standard Fire Insurance Company." And by section 5, "and each holder of stock in the said Alliance Insurance Company shall be a shareholder in the new company to the amount of stock he held in the said Alliance Insurance Company, and with," &c., and the Standard Insurance Company is in process of liquidation under a winding up order dated March 27th, 1883.

The liquidators contended that all the above parties had been shareholders in the Alliance Co., and were consequently shareholders in the Standard, and were liable as contributories to the extent of their stock.

The evidence of Henry Theodore Crawford, formerly the secretary of both of the amalgamated companies, was to the effect that powers of attorney to subscribe for stock were sent in to him by one or more agents of the Alliance Insurance Company, signed by each of the alleged contributories, except in Chisholm's case: that he instructed a clerk in the office to enter up the names in the stock ledger, and that from time to time notices of meetings and notices of a call were addressed to each of the parties and handed to the office boy to post.

The evidence also shewed that neither Turner nor Findlay ever received any of these notices. The reports of the Inspector of Insurance, published by the Legislative Assembly of Ontario, for the years 1882 and 1883, were also put in, shewing that all these alleged contributories were returned to the government as shareholders in the Alliance Insurance Company, except that Findlay's name did not appear in the report for 1883.

The different parties, were all examined before the Master.

Four of the parties, namely, Turner, Barber, Copp, (a member of the firm of Copp, Clarke & Co.) and Caston, swore that they had been induced by one Jarvis, an agent of the Alliance Insurance Company, to sign the powers of attorney on the understanding that a local board of the said company should be formed in Toronto, and an office opened there for the purpose of doing business: that Turner, Barber and Copp were to be directors of this local board, that Caston was to be solicitor; and that no local board was ever so formed.

Chisholm's case was different from the others.

It appeared that his name had been subscribed in one of the subscription books of the Alliance Insurance Company by one D. B. Chisholm, at that time president of the com-

pany. D. B. Chisholm was desirous that R. K. Chisholm his cousin should act as a director in the company. R. K. Chisholm at length agreed to give his note for \$500, which he supposed would qualify him to act as a director. The Act of Incorporation provided that ten shares should be the qualification, although he was not aware of this provision. D. B. Chisholm thereupon signed R. K. Chisholm's name in the subscription book for fifty shares, \$5,000, per D. B. Chisholm, his attorney. R. K. Chisholm never saw his name in the subscription book before the matter came up in the Master's office, but he attended three or four meetings of directors. In September, 1883, D. B. Chisholm absconded, and a call on the stock having been made, R. K. Chisholm, when notified of such call, went to Hamilton to find out why the company was making this demand on him. He swore that he was told that if he paid \$250, the amount of the call then due, nothing more would need to be paid, and he, R. K. Chisholm, thinking that this meant that his liability would be at an end, paid that amount by giving his note.

Chisholm was not represented by any counsel, and he was placed on the list of contributories.

From this ruling he appealed, and his appeal was argued on April 24th, 1884, before Ferguson, J., who gave the following judgment:

A. C. Galt, for the appeal.

Laidlaw, contra.

April 25, 1884. FERGUSON, J.—(*Chisholm's Case*). It was contended on his behalf that he did not sign the book or document. His name appears in it as having been signed by another Mr. Chisholm as his attorney, but it was said that the power of attorney was not proved. It does appear that Chisholm who wrote the name had some authority from this appellant, or if not, there is I think an adoption fully shown by his having paid not only the first call of ten per cent. but also a further call of five per cent.

upon the fifty shares opposite his name in the book. This book is of the same character as that signed by Kelly containing the same words above the signatures. I think it quite clear that the appellant Chisholm has been shown to have been a shareholder in the Alliance Company for the number of shares opposite his name in this book. He acted as a director of that company, and it is not disputed that he must have been a shareholder for some amount in it, and I think with the learned Master that his way of accounting for having made the payments cannot succeed so as to relieve him from the position of a shareholder for the full amount of the subscription.

Then it is not contended that he is not a shareholder in the Standard if he was a shareholder in the Alliance Company, he having been one of the actors in bringing about the amalgamation of the two companies, and I think I must agree with the learned Master, and decide that the appellant Chisholm is a shareholder in the present company for the full amount of the subscription, and dismiss his appeal, with costs.

Judgment accordingly.

Subsequently Chisholm obtained a new hearing of his case to put in further evidence.

On May 16th, 1884, the Master issued his certificate finding all the above parties were contributories.

This appeal was then had, and the following reasons of appeal, which were given in Turner's case, apply, with the modifications above stated, to Barber, Caston, and Copp, Clark & Co. :

1. The evidence shews that John Turner himself never subscribed for any stock, but that he signed a power of attorney to one H. T. Crawford, authorizing him, upon the performance of certain conditions, to subscribe for him. The conditions in question were never performed, and Crawford never signed John Turner's name in any subscription book ; but he requested a clerk in the office to enter said Turner's name in another book of the company containing no agreement to take shares at all.

This appears to have been carried out by the clerk, but there is no evidence as to when said clerk did this. It is submitted that the said power of attorney was inoperative until the performance of the conditions in question, and that, as a matter of fact, it was not acted upon by said Crawford according to its tenor, and that said Turner is not bound.

2. The Act of incorporation of the Alliance Insurance Company, of which company the said John Turner is alleged to have been a member, provides that no subscription for stock shall be legal or valid until ten per cent. shall have been actually and *bond fide* paid thereon. The said John Turner never paid anything on account of the said alleged subscription, and he never became a stockholder.

3. Even if he had himself signed the regular subscription book of the Alliance Insurance Company, such subscription would have merely amounted to an offer to take the stock in question, and would not have been binding either upon the company or the applicant until the said offer was accepted and notice of such acceptance given, or, in other words, until the said stock had been allotted, and notice given. No allotment was ever made, or notice thereof given.

4. The company does not appear to have treated John Turner as a stockholder, as he never received any notices whatsoever from them.

5. The so-called amalgamation was *ultra vires* and inoperative at all events as against a non-assenting party.

The appeals were argued before Proudfoot, J., on the 17th and 18th September, 1884.

Lash, Q. C., and *A. C. Galt*, for the appellants in all the cases.

CHISHOLM'S CASE.—The evidence shews that R. K. Chisholm never subscribed for any shares, and that if D. B. Chisholm did, it was without his authority. It is true

he acted as a director for part of the time, but D. B. Chisholm, the president of the company, had agreed to furnish him with his qualification for the \$500 note he gave. Once when he received a notice of a five per cent. call he spoke to the president, and was told not to mind, as the secretary would be instructed on the subject, and this must have been done as he was not troubled again, in fact his not being liable for any stock was so well recognized that he was paid in full a loss by fire, under a policy he held in the company, and no claim was made for any deduction to pay up the call which at that time had been made upon unpaid stock. Then when he was subsequently applied to for the five per cent. call he gave his note for \$250 to settle the matter, not because he was liable, but because he thought that would settle his whole liability and he did not wish to engage in a lawsuit. If the matter is one of contract the evidence does not show any agreement to take the shares: *In re Universal Banking Corporation—Gunn's Case*, L. R. 3 Ch. 40. There must have been two parties to the contract; either D. B. Chisholm agreed to give R. K. Chisholm for \$500 enough shares to qualify him as director, or R. K. Chisholm agreed with the company (D. B. Chisholm being president) to purchase his qualification for \$500. No one can be made liable for unpaid shares who agreed to take paid up shares; the contract must be carried out in its entirety: *In re Western of Canada, &c., Company—Carling's Case*, 1 Ch. D. 115; *In re Richmond Hill Hotel Company—Pellatt's Case*, L. R. 2 Ch. 533. If he acted as a director he was to get his qualification from D. B. Chisholm, or he was not qualified at all: *Re Colombia Chemical, &c., Works—Hewitt's Case*, and *Brett's Case*, 25 Ch. D. 283. He did not know he was in the books as a shareholder, and a director is not presumed to know the contents of the company's books: *In re Wincham, &c., Co.—Hallmark's Case*, 9 Ch. D. 329; *Re Joseph Horner & Sons—Plimsoll's Case*, 24 L. T. 653; *In re Aldborough Hotel Company—Simpson's Case*, L. R. 4 Ch. 184; *In re Metropolitan, &c., Co.—*

Brown's Case, L. R. 9 Ch. 102; *In re National, &c., Association—The Marquis of Abercorn's Case*, 4 DeG. F. & J. 78; *Vice v. Anson*, 2 B. & C. 409. In order to make him a shareholder it must be shown that he applied for stock, was accepted as a shareholder, and notified within a reasonable time. None of these things took place: *Næmith v. Manning*, 5 S. C. R. 417; *Ramsgate Hotel Co. v. Montefiore*, L. R. 1 Ex. 109. Under the company's Act of incorporation no subscription was to be valid until ten per cent was paid into the bank, and this was never done. D. K. Chisholm was not a holder of stock in the old company, and so did not become one in the new company: *In re Towns Drainage, &c., Co.—Morton's Case*, 16 Eq. 104; *Thring's Law and Practice of Joint Stock Companies*, 4th ed., 181, et seq. On the question of director's qualification see *In re Pelotas Coffee Co.—Karuth's Case*, L. R. 20 Eq. 506. There could be no ratification unless he was aware of the fact: *Story on Agency*, 9th ed., par. 239, 243; *Angell & Ames on Corporations*, 10th ed., sec. 517. Another test is, would specific performance be decreed between the company and the subscriber: *Buckley on 'The Companies' Acts*, 4th ed., 59; *Pollock on Contracts*, 3rd ed., p. 31.

Bain, Q.C., for the liquidators and *Laidlaw* for the petitioners. All these points were argued on the previous appeal before Mr. Justice Ferguson. R. K. Chisholm must be presumed to have known the provisions of the statute. He was one of the promoters of the company, and he authorized D. B. Chisholm to subscribe for stock, and he has by his acts and conduct ratified the subscription. The entry in the stock ledger, which stands in this country for the stock register, was an allotment, and notice may be inferred: *In re International Contract Co.—Levita's Case*, L. R. 3 Ch. 36; *In re Universal Banking Corporation—Gunn's Case*, L. R. 3 Ch., see remarks at p. 45 and the cases referred to in the judgment. He knew he must be a shareholder before he became a director; he acted as a director for nearly three years, and his election to this office is referable to this subscription. [PROUDFOOT, J.—You contend that he

ratified D. B. Chisholm's act, in making him a shareholder, and as the only act was the subscription for the stock he must have ratified the whole]. Yes. *Denison v. Leslie*, 3 A. R. 536, is a case where even the ten per cent. was not paid. [*Lash*, Q.C.—This case is different, it was a condition precedent.] The Winding-up Act, 45 Vic. ch. 23, sec. 8, shews a contributory is a person liable to contribute. Section 48 uses the words "every shareholder or member of the company:" *Buckley*, on The Companies Acts, 4th ed., ed. 106, 7 and 8, shows the position of a creditor; see also *In re Hull and County Bank—Re Burgess*, 15 Ch. D. 507. After a winding-up order is made the case is between the shareholder and the creditors, and the latter is in a better position than the company: *Buckley*, 109. When he gave the \$250 note he did not do it in full of all his liability, but in the hope that no further call would be made. He took no steps to remove his name as a shareholder. This case is similar to *Wilson v. Ginty*, 3 A. R. 134. *Oakes v. Turquand*, L. R. 2 H. L. 325, decides that creditors' rights are higher than those of the company.

Lash, Q. C., in reply. *Oakes v. Turquand* merely decides that after the winding-up order was made, the shareholder was too late to set up that a contract, which was admittedly made, was induced by fraud.

TURNER'S, FINDLAY'S, BARBER'S, COPP, CLARK & Co.'S and CASTON'S CASES.—*Lash*, Q.C., and A. C. Galt. The evidence shows a power of attorney was given by Turner to Crawford, the secretary of the company, to subscribe. Crawford made no subscription, but gave the power to the accountant, and told him to enter Turner in the stock ledger as a shareholder, which was done. The power was filed and notices were sent to him. A blotting pad and an advertisement in the *Monetary Times* were issued with his name as a Toronto director, but he swears he never received the notices, or saw the pad or advertisement, or his name in any government return. Crawford could not delegate his power, and what he did was not subscribing

stock. The stock ledger is a mere account, and no contract between the company and Turner: *Story on Agency*, 9th ed., par. 14 *et seq.*, and par. 68 *et seq.* The evidence shews that the power was given as an *escrow* on a condition precedent which was never performed. He swears distinctly that the power was signed on the condition that he was to be a director in Toronto, and no board was formed there: *Pellatt's Case*, L. R. 2 Ch. 533; *In re the Universal Banking Co.—Bartlett's Case*, 17 W. R. 131; *In re Mercantile Trading Co.—Stringer's Case*, L. R. 4 Ch. 475. The evidence of posting the notices to him is not sufficient, even if we had not Turner's denial of their receipt: *In re Constantinople, &c., Co.—Redpath's Case*, L. R. 11 Eq. 86. Even if they were posted it would not be sufficient: *McCracken v. McIntyre*, 1 S. C. R. 479. The whole contract must be carried out: see *Pellatt's Case*, *supra*. *Nasmith v. Manning*, 5 S. C. R. 417, decides this as only an offer by Turner, and it requires the assent of the company to make him a shareholder. 38 Vic. c. 66, sec. 2 (O.) provides that no subscription for stock shall be valid unless ten per cent. shall be paid. See also *Morton's Case*, *supra*. In Copp's case all calls were to be paid for in work, and this was carried out in part. In Caston's case he was to be solicitor in Toronto, and his power of attorney was not to be used until the office was opened, and a local board appointed in Toronto. All his stock was to be paid for in services rendered. The scrip certificate sent to him as to ten per cent. being paid was not true, and could not bind him. If the company did no business in Toronto his appointment was worthless: *Evans on Principal and Agent* 44; *Hurrell and Hyde's Joint Stock Companies*, 30, 31; *Re Charles Lafitte & Co.—De Rosaz's Case*, 21 L. T. 10. None of the appellants except Chisholm ever assented to the amalgamation, and they cannot be bound by it: *In re Empire Assurance Corporation—Ex p. Bagshaw*, L. R. 4 Eq. 341; *Clinch v. Financial Corporation*, L. R. 5 Eq. 456.

Bain, Q.C., and Laidlaw. The evidence against Turner and Findlay is not so full as against the other parties. The

company proposed to extend their business at Toronto by the appointment of a local board to receive and pass on applications; and one of the officers of the company procured powers of attorney from these parties authorizing the secretary of the company to subscribe for stock for each of them respectively. Their names were all entered in the stock ledger in pursuance of these powers and entered on the list of shareholders. Negotiations were continued for the formation of the board, but they fell through on account of the difficulty of election of a proper local manager. The company treated all these parties as shareholders, and Copp, Barber, and Caston received notices of meetings, calls, &c., from time to time. Turner and Findlay denied the receipt of notices, and this fact was not pressed against them. Copp and Caston made payments on account. Barber had stipulated for a credit for payment by his power of attorney. The stipulation about the formation of a board was not a condition precedent; it was only a collateral condition. These parties must become shareholders before they could be appointed directors, and the evidence is against any argument that the subscription for stock and the appointment of directors were to be contemporaneous—once a shareholder always a shareholder. The powers were delivered to the secretary without any stipulation being put upon their use, and it is manifest that at the time the parties intended to authorize a subscription for stock in the expectation that they would be appointed directors, but the failure of this does not relieve them from liability as contributories. The delay is against the parties, and coupled with the payments and delivery of scrip in Caston's case, is conclusive: *In re The New Theatre Co.—Bloxam's Case*, 4 DeG. J. & S. 447; *In re Universal Banking Corporation—Gunn's Case*, L. R. 3 Ch. 40; *In re Electric Telegraph Co. of Ireland—Cookney's Case*, 3 DeG. & J. 170; *In re Richmond Hill Hotel Co.—Elkington's Case*, L. R. 2 Ch. 511; *Bullivant v. Manning*, 41 U. C. R. 517; *Denison v. Lesslie*, 3 A. R. 536.

Galt, in reply. Neither Copp nor Caston ever made a payment on account of stock. Copp did some printing, which was credited to him, and the amount credited to Caston was so credited by the company of their own mere notion.

October 27, 1884. PROUDFOOT, J.—CHISHOLM'S CASE.—I have read the evidence in this case, and do not think that the additional evidence taken after the order of my brother Ferguson varies in any material point in favour of the appellant the facts as presented to him. I could not, therefore, allow the appeal without practically overruling his order. I must, therefore, dismiss the appeal, with costs.

TURNER'S CASE.—Mr. Jarvis, and Mr. Boustead, on behalf of the Alliance Insurance Company applied to Turner to become a shareholder in the company. They wished Turner to become a local director of the company. On account of his other business Turner hesitated to become a shareholder or director, and it was only upon a third application he consented upon certain conditions. He was told he needed to subscribe for the purpose of qualifying himself; and he signed a power of attorney on the 21st October, 1880, authorizing Mr. Crawford, the secretary of the company, to subscribe for twenty shares of the capital stock of the company, *on the understanding that it was not to be used except he became a director of the company*, a local director in Toronto. The power of attorney states that ten per cent. was paid, which was not the case. Crawford directed the accountant to make an entry in the stock ledger that Turner was a shareholder for twenty shares. This was done. From that time until he received a notice of a call of five per cent. in the amalgamated company, when a letter was sent to him by Mr. Haslett the solicitor of the company, demanding payment of the ten per cent. that should have been paid at time of subscription and of a second call of five per cent. Turner did nothing, took no part in the proceedings of the company, and received no notices of meetings or calls.

Blotting pads were printed showing a Toronto including Turner's name, and an advertisement inserted to the same effect in the *Monetary Times*. Turner's name was included in the list of members return made to the House of Assembly; but of all Turner says he was ignorant and never saw them never received any notices of meetings. In fact Toronto local board was never formed. Turner is emphatic and positive as to the condition attached signature of the power of attorney. He says the power to be of no force or effect until the local board was formed that Mr. Jarvis received it with that condition. Upon receiving Haslett's letter he repudiated all liability.

This evidence is not contradicted. It is supported by the evidence of Crawford. He says that Jarvis was sent with the instructions to form a local board of directors in Toronto. Mr. Turner was to be on the local board. He knows that Mr. Jarvis was to obtain a local board, and knows Turner and others subscribed, and were to be on the local board. Jarvis went down for the purpose of forming a local board, and no other. Those that were to be on the local board were to be shareholders.

Turner's name was never entered in the subscription books of the company, but only put in the stock ledger as the owner of twenty shares.

Turner's case differs from the others that were decided at the same time. He made it a distinct stipulation that unless the board were formed the power of attorney was not to be used. He never knew that his name was presented as a shareholder or as a member of a local board. I think that he made the formation of the board a condition precedent to his becoming liable as a shareholder. He never paid any deposit, and never intended to pay unless the board was formed, and never knew that his power of attorney had been exercised till notified of a call, when he repudiated liability. This case is thus brought within the class of cases of which *In Re National Equitable Provident Society—Wood's Case*, L. R. 15, Eq. 236

example, and others are collected in *Buckley on the Companies' Act*, 4th ed. 58, *et seq.*

I think Turner's name must be removed from the list of contributories.

FINDLAY'S CASE.—Findlay was applied to by Jarvis to become agent of the company, and signed a bond for his conduct in that capacity. He says he never subscribed for any shares in the company, nor intended to authorize Crawford to subscribe for stock for him.

The papers signed or said to be signed by Findlay have not been left with me, but the counsel on both sides appeared to treat it as the same in principle as Turner's case.

He is not properly a contributory for the reasons given in Turner's Case.

BARBER'S CASE.—This had some features in common with Turner's Case. There was the application to him to become a member of the local board, and to become a shareholder. Mr. Caston, who was to be solicitor of the local board, and was interesting himself in securing directors, wrote to Barber on the 29th October, 1880, enclosing a power of attorney to subscribe for stock, and stating that "the board now stands: W. W. Copp, Dr. J. S. King, John Canavan, John Turner, and yourself." That was of course the contemplated board. Mr. Caston also asks him to state "the times you want to pay the ten per cent. call, any time to suit you." On the 9th November, 1880, Mr. Barber signs the power of attorney to Crawford to subscribe for fifty shares, and adding to the printed part of the power a clause that the ten per cent. was to be payable in one year from date.

On the 20th January, 1882, Crawford wrote to Barber in the following terms: "In November, 1880, you subscribed for \$5000 stock in this (the Alliance) Company and were good enough to consent to act on our local board of directors at Toronto. We are now making our annual returns to government, and are desirous of having the

\$500 due on your stock paid before doing so. If convenient to you will you kindly send me a cheque for the amount, or shall I draw on you for it." And on the 22nd February, 1882, a notice was sent to him that the second annual meeting of the shareholders was to be held in Hamilton on the 1st March.

There is no evidence, as in Turner's case, that the formation of the board was to be a condition precedent to becoming a shareholder, and there is the additional circumstance of the time stipulated for payment of the ten per cent, which would rather seem to indicate an intention to become a shareholder at once, no doubt with an expectation of being subsequently appointed a director.

The power was acted on, as in Turner's case, by Crawford directing the accountant to enter Barber's name in the stock ledger as the owner of these fifty shares, and he was so entered, and was returned to the government as a shareholder.

I think the entry by the accountant, under Crawford's direction, was equivalent to an entry by Crawford himself. It was the usual course of business in the company; there was no delegation of any discretionary power; it was a mere ministerial act, and, as said by Lord Cottenham, in *Clough v. Bond*, 3 M. & C. 497: "Necessity, which includes the *regular course of business*, * * will * * exonerate." In *re Leeds' Banking Co.*,—*Howard's Case*, L. R. 1 Ch. 561, there was an express delegation of a discretion.

Nor is it material that the name was not entered in the subscription book, nor that there was no specific allotment of stock. Both these questions are disposed of by the Chancellor in *National Insurance Co. v. Egleson*, 29 Gr. 406.

But beyond this there is the fact, that though aware, in January, 1882, that he was considered and treated as a shareholder, and in February, 1882, he receives notice in that character of a general meeting of the shareholders he takes no steps to relieve himself from liability, and

allows his name to be returned to the government as a shareholder. The only thing he did seems to have been to instruct Mr. Caston to ask a return of the note he had given for the ten per cent to be cancelled, as it was held only conditionally by the company. Mr. Caston made this demand on the company by letter of 16th February, 1882, but nothing further was done.

He must, I think, be taken to have waived any right to object to his name being placed on the list of contributories. Barber was properly placed on the list.

COPP, CLARK & CO.'S CASE.—The circumstances are somewhat similar to the Barber case. There is not the same distinct evidence of a condition precedent as in Turner's case. There was, no doubt, an understanding that a local board was to be constituted, and Mr. Copp was to be a director. There was also an understanding that the calls were to be paid in work (printing). About from \$100 to \$200 work has been done upon this understanding, which was to have been a credit upon the stock, and it was carried to their credit in the books of the company. Copp & Co. printed the blotting pads containing the names of the local directors, including Copp. They also saw the *Monetary Times* with an advertisement to the same effect. They also received notice of the shareholders' meeting on the 1st March, 1882, and notice of the call of 5 per cent. in April, 1883, in the amalgamated company. Notice was given by Mr. Caston on behalf of Copp, who was an individual shareholder, repudiating liability on the 16th February, 1882, but he does not appear to have repudiated on behalf of Copp, Clark & Co. For the reasons given in Barber's case I think the power of attorney was properly exercised, and that Copp, Clark & Co. became shareholders in the company. The agreement as to payment in work was a collateral arrangement, similar to that in *Re Richmond Hill Hotel Co.—Elkington's Case*, L. R. 2 Ch. 511.

I think they are contributories.

CASTON'S CASE.—Caston assisted Jarvis in procuring subscribers to be made directors in the local board. He was to be solicitor of the company in Toronto. He signed the power of attorney, which he says was not intended to be used until the Toronto matter was consummated, but the plan was not carried through; and if it had not been for that condition the power would not have been signed. He was to have credit for his services as payment on the stock. It was distinctly understood he was to pay no cash on his stock.

A certificate that Caston was a holder of ten shares in the company was issued on 9th November, 1880, and he has had it in his possession for several years. He was appointed solicitor for the company for the county of York and city of Toronto by an instrument under the seal of the company on the 30th October, 1880.

He received notice of the shareholders' meeting of 1st March, 1882, and of the five per cent call of the 21st April, 1883. He does not seem ever to have expressly repudiated liability, but he says that when the matter fell through, when they could not get up a local board, "these gentlemen (intended directors) were released." He is asked by the Master: "Q. Did you have any communication with the company that you withdrew from it? A. With Jarvis and Mr. Crawford. Q. When? A. When you say 'withdraw' I don't know that it was put in that way, but it was treated that the matter had fallen through, and these things had become worthless."

The power of attorney was acted upon in this as in the other cases, and followed up by an actual certificate of ownership, and an appointment as solicitor. Notices were also received by Mr. Caston in the character of a shareholder.

I think the subscription sufficient, the allotment sufficient, and, for the reasons given in the other cases, that Mr. Caston is properly on the list of contributories.

Mr. Caston is a professional gentleman, and must have been aware of the necessity for having his shares cancelled

if he wished to avoid liability to creditors in the event of the insolvency of the company, but he seems to have been content to rest upon a sort of understanding with Jarvis and Crawford that he was not liable.

G. A. B.

[QUEEN'S BENCH DIVISION.]

HUGHES V. THE BRITISH AMERICA INSURANCE COMPANY,
AND

HUGHES V. THE LONDON ASSURANCE COMPANY.

Agreement to refer—Staying action · Costs of arbitration.

On an application by an Insurance Company to stay proceedings, in an action on a policy, pending an arbitration as to the amount of loss under the statutory condition, the Court granted a stay on the company admitting its liability on the policy; and further ordered, but without defendant's consent, that either party might, after the award, apply to the Court in respect of the costs of the arbitration. On a subsequent application an order was made by a Judge in Chambers on defendant to pay a part of such costs. *Held*, that the Court had jurisdiction to deal with the costs; and moreover, that defendants having submitted to the order of the Court, and taken the benefit of it, could not object to the order of the Judge made under it.

THE first named of these actions was brought upon a policy of insurance containing the statutory condition as to arbitration, and the second upon policies of insurance containing the following condition: "In case any difference or dispute shall arise between the assured and the corporation touching any loss or damage by fire, such difference, if the corporation shall so require, shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding to all parties."

The loss occurred on or about the 22nd of July, 1883. The defendants, on the 25th of October, 1883, served notice

upon the plaintiff, requiring him to arbitrate, and appointing their arbitrator.

On the 27th of October, 1883, these actions were commenced.

On the 16th day of November, 1883, the Master in Chambers, having been applied to under R. S. O. ch. 50, sec. 214, ordered that all further proceedings in these actions should be stayed until after the plaintiff had appointed an arbitrator, and the value of the property insured, of the property saved, and the amount of loss and the proportion thereof, if any, to be paid by each of the defendants, had been determined by arbitration pursuant to the statutory condition in that behalf, and that the costs of and incidental to the application and the order should be costs in the cause.

On appeal from this order to the Judge in Chambers on the 23rd day of November, 1883, the learned Judge allowed the appeal, and set aside and rescinded the said order, and ordered that the costs of the appeal and of the motion for the order appealed from should be costs in the cause to the plaintiff in any event.

On motion, by way of appeal from this order to this Court, this Court, on the 15th of December, 1883, ordered that the said motion should be dismissed with costs, to be costs in the cause to the plaintiff in any event; and the counsel for the defendants agreeing thereto, and abandoning all defence to this action, and admitting their liability under the policies sued on, this Court ordered that all proceedings in these actions should be stayed; that the plaintiff should be at liberty to sign judgment and proceed in these actions for such amount as might be awarded to him by the arbitrator or arbitrators then or thereafter to be appointed between the parties under the policies of insurance sued on in these actions, and the statutory condition therein in that behalf, together with the costs of these actions, if said amount and the said costs were not duly paid by the defendant to the plaintiff within three weeks after such award so made and published, both parties to these actions being at liberty to move against such award if so advised, costs

of this motion to be costs in the cause in any event to the plaintiff; and this Court further ordered, without the consent of the defendants, that either party should be at liberty, after the making of said award, to apply to a Judge in Chambers in respect to the payment of the costs of the reference and award.

On the 18th day of July 1884, Rose, J., sitting in Chambers, ordered that the defendants should each forthwith after taxation thereof pay to the plaintiff one-third of his costs of and incidental to the reference to arbitration of these suits, and that the said defendants should also each pay to the plaintiff one-third of the amount paid by the plaintiff for the costs of the award and arbitrators' fees on such reference, and that the defendants should also pay to the plaintiff the costs of and incidental to the application.

In addition to these actions there was also an action in the Common Pleas Division of *Hughes v. The Hand in Hand Mutual Fire Ins. Co.*, on a policy of insurance on the property covered by the policies of insurance sued upon in these actions, in which action the like proceedings had been had and taken, and the like orders made as in these actions, and the learned Judge fixed the proportion of the costs of the reference and award, and arbitrator's fees, which each defendant ought to pay, at one-third of the whole.

On the 21st of November, 1884, *Foster* moved in this Court to set aside the said order made by Rose, J., with costs, on the ground that the learned Judge had no jurisdiction to deal with the costs of the reference: that the defendants received no indulgence from the Court; and he objected to the jurisdiction to deal with such costs.

He referred to *Re Harding*, 4 O. R. 605.

Watson, contra, cited *Taylor v. Gordon*, 9 Bing. 573; *McIntosh v. Blyth*, 1 Bing. 269.

January 6, 1885. ARMOUR, J.—I think the objection now raised is an objection that ought to have been made to the order of this Court staying these actions, for in ~~that~~ order this Court directed that “either party might be at liberty, after the making of said award, to apply to a Judge in Chambers in respect to the payment of the costs of the reference and award,” and thereby assumed jurisdiction and control over these costs, and in effect reserved them to be dealt with by a Judge in Chambers after the making of the award; and I do not think that the defendants, having submitted to the order of the Court, can now attack, for want of jurisdiction, the order of the Judge in Chambers, which was made merely in pursuance of this power conferred upon him by the order of this Court.

I think, however, that this Court had jurisdiction over these costs, and that the Judge in Chambers had jurisdiction under the power conferred upon him by the order of this Court to make the order complained of.

“Whenever the parties or any of the parties to any deed or instrument in writing agree that any existing or future differences between them or any of them shall be referred to arbitration, and any one or more of the parties so having agreed, or any person or persons, claiming through or under them, nevertheless commences an action at law or a suit in equity against the other party or parties, or any of them, in respect of the matters so agreed to be referred, or any of them, then, upon the application of the defendant or defendants, or any of them, after appearance and before plea or answer, and upon the Court or Judge being satisfied that no sufficient reason exists why such matters ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was at the time of the bringing such action or suit, and still is, ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, the Court in which such action or suit has been brought, or a Judge thereof, may make a rule or order staying all proceedings in such action or suit, on such terms, as to costs

and otherwise, as to such Court or Judge seem proper; but such rule or order may at any time afterwards be discharged or varied as justice requires": R. S. O. ch. 50, sec. 214.

In *Newton v. Taylor*, L. R., 19 Eq. 14, a suit was instituted to take the accounts of a partnership between the plaintiff and defendant upon the terms that the plaintiff should be entitled to one-third of the profits, and should bear one-third of the losses, and that the defendant should be entitled to and should bear the remaining eleven-twelfths.

The partnership articles contained the ordinary arbitration clause, and on April 23rd, 1874, an order was made in the suit, pursuant to the Common Law Procedure Act, 1854, sec. 11, similar to R. S. O. ch. 50, sec. 214, that the matters in difference be referred to arbitration, and that in the meantime all further proceedings in the cause be stayed, the costs of the cause being reserved.

On the 30th of October an award was made in pursuance of this order, whereby it was found that a sum of £2,110 10s. 6d. was due to the plaintiff. A motion was then made, on behalf of the plaintiff, that the defendant might be ordered within seven days to pay to the plaintiff the amount found due to him by the award, and that the costs of the suit and the reference and award might be taxed and paid by the defendant. Sir G. Jessel, M. R., said "if the suit had been prosecuted to the end the costs of taking the accounts would have been paid out of the partnership assets, and would thus have been borne practically as to one-twelfth by the plaintiff, and as to the rest by the defendant; and the fair order therefore appeared to be that the costs of both parties, including those of the reference and award, should be taxed and paid as to one-twelfth by the plaintiff, and as to eleven-twelfths by the defendant."

In this case it is to be observed that by the order the costs of the cause only were reserved.

It seems also that if the order of this Court had been silent as to these costs, this Court could even now vary it under the terms of the proviso at the end of the section

above quoted, by ordering the defendants to pay these costs. See *Bustros v. Lenders*, L. R. 6 C. P. 259. I think the words of this section, "on such terms as to costs and otherwise," were quite wide enough to confer jurisdiction upon this Court to make the order it did make, and to support the order made by the Judge in Chambers in pursuance of it. There is another ground, however, upon which, in my opinion, the defendants' motion must fail. The provision in the order of this Court as to these costs is one of the conditions of the order. It is true it was made so without the defendants' consent, but it was nevertheless so made, and the defendants submitted to the order and accepted the benefit of it, and cannot now be allowed to repudiate the burden of it.

In my opinion the motion must be dismissed, with costs.

WILSON, C.J.—The order of the Court having directed that either party might apply to the Judge in Chambers in respect of the costs now in question prevents the defendants from disturbing the decision of the Judge in Chambers after they have taken the benefit of the order, and the order itself still stands. I may say I agree in the judgment just given throughout.

O'CONNOR, J., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

SEYMOUR V. LYNCH.

Indenture—Construction—Lease or License.

In an instrument by indenture, under the Short Forms of Leases Act, the plaintiff was described as lessor, and P. and H. lessees, the granting part being that the lessor did "give, grant, demise, and lease * * * the exclusive right, liberty, and privilege of entering at all times for * * * in and upon that certain tract of land situated * * * reserving that portion thereof occupied, or hereafter to be occupied as roadway by a railway company named * * * and with agents to search for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises," &c. The lessees were to have the right to use such timber found on the premises as might be required to carry on their operations, and such use of the surface as might be necessary for all the purposes appertaining thereto; also to pay taxes and to do statute labour assessed upon the premises; and they were not to allow any manufacture or traffic in intoxicating drinks upon said premises, or to carry on any business that might be deemed a nuisance thereupon; and there was a proviso that on the termination of the lease the lessor should have quiet possession, a proviso for re-entry in case of forfeiture, and a covenant by the lessor for quiet enjoyment.

Held, reversing the judgment of Patterson, J. A., a lease, and not a mere license.

INTERPLEADER, to try whether the plaintiff, at the time of the seizure of certain goods by the sheriff of the county of Hastings, under a writ of *fieri facias*, dated the 7th day of January, 1884, issued out of this Court, and directed to the said sheriff, for the having execution of a certain judgment theretofore in this Court recovered by the defendants against the Hastings Loan Company (Limited), was entitled, as against the defendants, to a certain sum of money, to wit, \$2,500, as one year's rent of the premises whereon the said goods so seized as aforesaid were lying and being at the time of their seizure by the said sheriff.

The case was tried by Patterson, J. A., at the last Spring Assizes, at Belleville, without a jury.

The whole question turned upon the construction of the following instrument, whether it should be construed as a lease or a license:

"This indenture made this 12th day of November, 1878, in pursuance of the Act respecting short forms of leases, between Judwich E. Seymour, lessor, of the first part, and

Charles J. Pusey, and A. W. Humphreys, lessees, of the second part, Witnesseth, that the said lessor, for and in consideration of the rents and royalties to be paid, and of the covenants, agreements, and conditions hereinafter named to be kept and performed by the said lessees, their heirs, executors, administrators, assigns, and successors, hath, and by these presents doth give, grant, demise, and lease unto the said lessees, their successors or assigns, the exclusive right, liberty, and privilege of entering at all times, for and during the term of ten years from the first day of January, 1879, in and upon that certain tract of land, situated in the township of Madoc, consisting of the west half of lot number eleven in the fifth concession of the said township of Madoc, containing by admeasurement one hundred acres of land, be the same more or less, reserving that portion thereof occupied or hereafter to be occupied as roadway by the Belleville and North Hastings Railway, and with agents, labourers, and teams, to send for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises, and of making all necessary roads for ingress and egress to, over, and across the same to public roads or places of shipment; also the right, liberty, and privilege to erect on the said premises the buildings, machinery, and dwelling houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in mining said ores; the said lessees to do no unnecessary damage to said premises. And at the termination of this Indenture and for three months thereafter, as well as during its continuance, the said lessees, their successors and assigns, are to have the right to take down and remove their erections before named, and to take any ores mined, and to use such timber as may be found on the premises as may be required in carrying on mining operations, and such use of the surface as may be needed for all other purposes appertaining thereto; in consideration whereof, the lessees, their heirs, executors, administrators, assigns, and successors, agree to pay to the lessor, his heirs and assigns, twenty-five cents of lawful money of Canada for every ton of 2,240 pounds of clean and merchantable iron ore mined and taken away from the said premises by them, the quantity of said iron ore so taken away to be ascertained by the scales and records of the Belleville and North Hastings Railway Company, or the books of the lessees of said railway, access to whose books and records is hereby

to the lessor by the lessees whenever desired by order to ascertain the quantity of ore shipped, and amount of royalty due to him. Payments of royalty be made quarterly on the first days of January, July, and October, in each and every year at the place of Madoc, in the county of Hastings, during the term of this lease, the first payment to be made on the first day of April, 1879. And in each and every year during the continuance of this lease the said lessees shall mine and carry away at least 10,000 tons of ore; and should the amount from any cause be less than 10,000 tons in any one year, the quantity for any and every consecutive years shall not be less than 20,000 tons. The amount of royalty payable each year shall be not less than \$2,500, no matter although the quantity actually mined during any one year may be less than hereby agreed upon; but the lessees shall always have the right and privilege of mining in any year any amount over, above, and in excess of the 10,000 tons here- agreed upon; and if in any year they shall have paid less than upon a larger quantity of ore than was actually mined, the deficiency may be made good to them out of the excess, if any, taken out over and above 10,000 tons in the following year; but all such excess, save only so much as is required to make good a deficiency of the preceding year, on which royalty has already been paid, shall be in addition to the above specified royalty of twenty-five cents per ton; and the quarterly payments to be paid to or by the lessees shall be the above specified royalty of twenty-five cents per ton on all ore actually shipped during the three previous calendar months; but the fourth quarterly payment in each year shall make good any deficiency that may have occurred in any or all the three preceding quarterly payments, so as to bring up the yearly royalty to the amount of \$2,500, or more in proportion, if more than 10,000 tons of ore shall have been mined out after making good any deficiency from the preceding years as above provided. And the said lessees shall pay all taxes and to perform all statute labour upon such premises during the term of this lease, and that they will not allow any manufacture or traffic of intoxicating drinks upon said premises, and will not carry on any business that may be deemed a nuisance upon the same. And it is further understood and agreed that if the ore upon said premises prove unworkable from

any cause, or unfit for the manufacture of steel by the Bessemer process, or fail altogether, or should any readjustment of tariffs between Canada and the United States during the terms of this lease act prejudicially to the mining interests of the said lessees, then, on giving thirty days' previous notice, in writing, to the said lessor, and payment of all royalties due at the time of termination, this lease shall terminate and end, and the lessor shall have quiet and peaceable possession of the said premises. And all ore excavated and mined, but not removed at the time of such termination, shall be subject to royalty on removal, and unless removed in three months after such termination shall become the property of the lessor. And the lessees, in case of such prior termination, or at the end of this lease, shall fill up any holes made in mining or exploring, or securely fence in the same. And should any of the hereinbefore mentioned conditions and obligations be neglected or unperformed by the said lessees, or should any of the payments due by them remain unpaid, whether lawfully demanded or not, for thirty days after the same shall have become due and payable, then the said lessor shall have the right of re-entrance upon the said premises, and this lease shall terminate and become null and void. And the said lessor covenants with the lessees for quiet possession, and that he is the lawful owner of said premises, and that he will covenant, secure, and forever defend the said lessees in the rights and privileges herein granted them from all and every other person or persons whatsoever."

The learned Judge held this instrument to be a license merely, and found that at the time of the seizure by the sheriff of the goods the plaintiff was not entitled, as against the defendants, or either of them, to any sum of money as rent of the premises whereon the said goods were lying and being at the time of the seizure.

On the 26th day of November, 1884, *Clute* moved to set aside the verdict, and enter it for the plaintiff.

The main point in this action is, whether the instrument under which the plaintiff claims one year's rent out of the proceeds of goods sold by the sheriff, is a lease or a mere license. The plaintiff submits that the instrument is a

lease. It gave to the lessees the exclusive right and privilege to enter upon the premises for ten years, which necessarily excluded the lessor. The mining privileges are additional, and can in no way limit the term granted: *Bac. Ab.* "Lease," K. Then, there are many provisions in this instrument which are applicable to a lease, *e. g.*, a proviso for re-entry, &c., &c. The payments by royalty are in the nature of rent, and may be distrained for where definite: *Ex p. Hankey*, 1 Mont. & M. 247. As to the nature of a license, see *Crocker v. Fothergill*, 2 B. & Al. 652-661; *Wood v. Leadbitter*, 13 M. & W. 843; *Watson v. Spralley*, 10 Ex. 235; *Morgan v. Crawshaw*, L. R. 5 H. L. 319; *Kamphouse v. Gaffner*, 73 Ill. R. 453; *Jones v. Reynolds*, 4 A. & E. 805; *Carr v. Benson*, L. R. 3 Ch. 524. The defendant will rely chiefly on the case of *Hanley v. Wood*, 2 B. & Al. 724, but upon a careful reading of the case it will be found that it makes distinctly for the plaintiff.

The case also of *Burnside v. Marcus*, 17 C. P. 430, is not an authority against the plaintiff's contention, as will be seen by reference to it. It is conceded that if the instrument is a lease the plaintiff should succeed. See *Williams v. Lindsay*, 8 Bing. 28; *Andrews v. Dixon*, 3 B. & A. 645; *Risely v. Ryle*, 11 M. & W. 16. As to the form of lease and right to distrain, see *Walsh v. Lansdale*, 21 Ch. D. 9; *Bishop v. Goodwin*, 14 M. & W. 260; *Marquis of Bute v. Thompson*, 13 M. & W. 487; *Woodfall*, L. & T., 11th ed., 445, 443, 450. As to notice to sheriff, see *Brown v. Ruttan*, 7 U. C. R. 97; *Kingston v. Shaw*, 20 U. C. R. 223.

Northrup, contra. The instrument is a mere license, and the plaintiff can therefore not distrain. Even if a lease of the *mines*, plaintiff would not be helped, for unless the soil was demised there would be nothing to distrain. See *Brainbridge Law of Mines*, 4th ed., 510. The grant is an exclusive right of entry to mine, not of entry merely, and there is no grant of the soil. The instrument does not shew that the grantor divested himself of possession for a fixed time, and the grantee to come in: *Bac. Ab.*, "Lease" K.

Hanley v. Wood, is a clear authority in defendant's favour. See also *Burnside v. Marcus*, both cited by the other side.

January 6, 1885. ARMOUR, J.—I do not think we need trouble ourselves as to whether we ought to receive the affidavit evidence now furnished or not, because the instrument in question must be construed according to its terms and the intention to be deduced from such terms, and not by extrinsic evidence.

“Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for such a determinate time, such words, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose:” *Bacon's Ab. Lease*, K. Having regard to this canon I have come to the conclusion that the instrument in question is in construction of law a lease. It gives the *exclusive* right, liberty, and privilege of *entering* at all times for and during the term of ten years in and upon the west half of lot 11, 5th concession of Madoc. This excludes any right of entry by the lessor, and indicates an intention on his part to divest himself of the possession of the land: *Roads v. The Overseers of Trumpington*, L. R. 6 Q. B. 56; *Carr v. Benson*, L. R. 3 Chy. 524; *Chetham v. Williamson*, 4 East 469. The reservation (or rather exception) of that portion of the land occupied, or thereafter to be occupied as roadway by the Belleville and North Hastings Railway, also indicates a divesting by the lessor of his own occupation of the land; otherwise there would be no necessity for the exception.

The lessees are to have the right to use such timber as may be found on the premises (that is, on the land) as may be required in carrying on business operations, and such use of the surface as may be needed for all other purposes appertaining thereto. This grant of the use of the surface

and of the timber seems to me to confer exclusive possession upon the lessees.

The lessees agree to pay all taxes and to perform all statute labour assessed upon said premises, that is, said land, during the term.

The lessees also agree that they will not allow any manufacture or traffic in any intoxicating drinks upon said premises, that is, said land, and that they will not carry on any business that may be deemed a nuisance thereupon. This provision seems wholly inconsistent with the idea of a mere license, and of the lessor continuing in possession of the land.

The provision that on the termination of the lease the lessor shall have quiet and peaceable possession of the said premises, that is, said land, the proviso for re-entrance upon the said premises, (that is, said land), in case of forfeiture, and the covenant by the lessor for quiet enjoyment, and that he is the lawful owner of said premises, (that is, said land), seem to me to show clearly that by the instrument in question the lessor intended to divest himself of the possession and that the lessees should come into it for the term of ten years, and that it is therefore in construction of law a lease.

I have treated the words, "the said premises," as meaning "the said land," for I think the context plainly shows that the latter is what is meant where the former are used.

The learned Judge, we are told, decided as he did upon the authority of *Doe Hanley v. Wood*, 2 B. & Ald. 724, but a perusal of that case will show that the instrument in judgment in that case was widely different from the one in question in this.

See also *Rex v. St. Anstell*, 5 B. & Ald. 693 ; *Norway v. Rowe*, 19 Ves. 158.

In my opinion the judgment of the learned Judge should be reversed, and the verdict entered for the plaintiff.

WILSON, C. J.—The form of a mining lease, as given in *Bythewood's Conveyancing*, 3rd ed., Tit., Leases, is expressed as follows :

“ This indenture made, &c., between (lessor), of the one part, and (lessees), of and on behalf of themselves and their co-adventurers, of the other part, Witnesseth, that in consideration of the royalties, payments, and covenants on the part of the lessee, the lessor doth give and grant to the lessee full liberty, license, power, and authority to dig, work, mine, and search for, &c., within, under, and throughout such parts of the farm, &c., and all metals, &c., there found, to raise and bring to grass, &c., and to carry away and convert the same to their own use. To have, hold, use, exercise, and enjoy, all and singular the powers, licenses, authorities and privileges, so hereby given and granted unto the lessee, &c., from, &c., for and during, &c. Yielding and paying, laying out and delivering therefor unto the lessor, (part of the ores, if so reserved, or a money payment if agreed upon, and covenant to deliver the share of ores, &c., reserved, or the value thereof in money, if notice that money will be required in lieu of the share of ores.”)

There may also be a clause of distress, and the right to sell the same in case the royalties, &c., or money payment be in arrear, “ as in case of distresses for rent reserved in common leases for years.”

There is in such a lease an implied right to use what is necessary for the convenient working of the mine, as the right to enter, and to break the surface if the lessee have the right to open mines. and a right of way for carrying away the ore. It allows no use of the surface, nor the right of deposit upon it to a greater extent or for a longer time than necessary, and it is said it is questionable whether the lessee has power to deposit the ore upon the land for the purpose of sale, or whether he can allow or permit purchasers in to view the coal, &c.: *Cardigan v. Armitage*, 2 B. & C. 211.

The *reddendum* given in the case of a coal mine in *Bythewood* is :

"Yielding and paying during the term for every acre of the surface of the land entered upon and used by the lessee, &c., the yearly rent of [so much money]. And if the lands are demised, there is a rent usually reserved for the same."

It is clear an ejectment will lie for a mine, and that the metal and materials may be conveyed so as to pass the legal estate in them during the term. But in place of a demise being made of the mines and minerals, there may be a license given to dig and raise them, and to convert such parts of them as may be so raised to the surface to the sole use of the licensee.

In the case of *Doe Hanley v. Wood*, 2 B. & Al. 724, it was disputed whether the instrument in question was a license to take or a demise of the mines and minerals.

The instrument was by indenture, by which the owner in fee granted to John A. Hanley, his partners, fellow-adventurers, executors, &c., free liberty, license, power, and authority to dig, &c., for tin, &c., and all other metals and minerals throughout all, &c., and the tin, &c., there found to raise, &c., and to dress, make merchantable and dispose of to their own use, &c. In some parts of the instrument expressions were used such as "the land hereby granted," and there was also a clause for re-entry.

The Chief Justice, at p. 738, said: "It is stated by Lord Coke that one of the proper offices of the premises or granting part of the deed is to comprehend the certainty of the tenements to be conveyed. This indenture does not purport to demise the land, or the metals or minerals therein comprised. * * The purport of the granting part is to grant a liberty, license, power, and authority to dig, &c., throughout the lands described, and to dispose of the ore, metals and minerals only that should within that term be there found, to the use of the grantee * * Instead, therefore, of granting all the several ores, &c., that were then existing on the land, its words import a grant of such parts thereof only as should upon the license be found within the described limits * * the grantor parting with no estate or interest in the rest."

The instrument in this case is by indenture, made under the Act relating to short forms of leases. Seymour, the plaintiff, is described as lessor, and Pusey and Humphreys as lessees. The granting part of the conveyance is that the lessor "doth give, grant, demise, and lease unto the parties of the second part, their successors or assigns, exclusive right, liberty, and privilege of entering at all times for, &c., in and upon that certain tract of land situated, &c., containing one hundred acres, more or less, reserving that portion thereof occupied, or hereafter to be occupied as a roadway, &c., and with agents, &c., to search for, dig, excavate, mine, and carry away the iron ores upon or under said premises, &c."

The lessees are also to pay taxes and the statute labour assessed upon the said premises, and they are not to allow any manufacture or traffic in intoxicating drinks upon the said premises, or to carry on any business that may be deemed a nuisance thereon.

This instrument is plainly a demise of the land, with right to mine, that is, to open mines, which otherwise would be waste: *Saunders' Case*, 5 Rep. 12*a*.

The case of *Roads v. The Overseers of Trumpington*, R. 6 Q. B. 56, is an express authority that the exclusive right of entry or occupation upon the land is a demise of the land: *Carr v. Benson*, L. R. 3 Ch. 524.

I therefore agree the motion must be made absolute.

O'CONNOR, J., concurred.

Motion absolute.

[QUEEN'S BENCH DIVISION.]

ROBINS ET AL. V. BROCKTON.

Municipal corporation—Contract not under seal—Liability.

The financial affairs of a municipal corporation being in disorder a commissioner was appointed by the Government to investigate them, and the plaintiffs, professional accountants, were employed by the council to examine and arrange the accounts. Resolutions were passed, not under seal, recognizing that the work was being done by the plaintiffs, who reported to, and were in communication with the council. Their report, as the learned Judge found at the trial, was before the commissioner, and in a by-law one of the plaintiffs was referred to as "having rewritten the books."

Held, WILSON, C.J., dissenting, that the plaintiffs could recover, though there was no by-law directing the work to be done, or appointing the plaintiffs to do it.

Silby v. The Corporation of Dunnville, 8 A. R. 524, and *Young v. The Corporation of Leamington*, 8 App. Cas. 577, distinguished.

THIS was an action to recover the sum of \$694.30, claimed by the plaintiffs to be due them by the defendants, a municipal corporation.

The defence was mainly that the plaintiffs were not appointed by by-law under the corporate seal.

The trial took place before Hagarty, C. J., at the last Toronto Spring Assizes, without a jury, when the learned Chief Justice found in favour of the plaintiffs for \$690, and gave the following judgment:

HAGARTY, C. J.—The plaintiffs are a firm of accountants, and sue defendants for services as such.

In the spring of 1883, the accounts of defendants were in a most unsatisfactory and unintelligible state.

The auditors failed to unravel the accounts, and one of them resigned. The other auditor and certain members of the council applied to plaintiffs to rewrite the books and investigate the accounts. About the 18th of May plaintiffs commenced the work, the accounts of 1881, 1882, and part of 1883, having to be investigated.

Considerable labour and time were bestowed upon the work, which appears to have required both skill and care. and plaintiffs claim \$620.

The plaintiffs were in communication with the clerk of defendants, and with members of the council, and letters passed between them.

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There was dissatisfaction amongst the ratepayers— and
an application was made to the government on their behalf
to issue a commission to investigate the accounts.

The council were anxious to have their examination of
the accounts made before proceedings were taken under
the commission, and asked a delay from the government,
which was granted.

The defendants were pressing the plaintiffs to hasten
their report.

It may be necessary to understand the case to refer to
the following copy of the minutes of the council:

[The minutes referred to, so far as material, were as
follow :]

Meeting held 23rd April, 1883.—All members present.

Mr. Sheppard asked whether it is possible to re-write the books, and
present them to the auditors.

On motion, the treasurer was heard before the council, and expressed his
concurrence in the re-writing of the books.

Mr. McKenzie then tendered his resignation, the vote on which was
declared a tie, and the resignation was therefore not accepted.

The reeve then appointed Mr. J. B. McLachlan, of Parkdale, his auditor
for 1882, in the room and stead of Mr. Awde.

It was moved by Mr. Sheppard, seconded by Mr. Woods :
“ That the books of this corporation be handed to Mr. Arthur L. W.

“ That the books be re-written at once, using his system of municipal accounts, and
the reeve and the chairman of the finance committee be empowered
to make the necessary arrangements.”

Meeting held 7th May, 1883.—All the members present.

The committee rose and reported the following resolution :
“ That this committee instruct the newly appointed auditors to
collect all papers and books in connection with this municipality
incorporation, and rewrite the same, also audit within two weeks
return to this council ; if not complied with, the committee of en-
be at once appointed.”

The report of the committee of the whole was received and a

In the interval between the meeting of April
21st May, Mr. McLachlan had signified his refusal
as auditor.

Meeting held 21st May, 1883.—All the members present.

The following communications were read :

From Robins Bros., asking extension of time for audit.

A by-law was introduced to appoint an auditor in the
Wm. Awde, which was amended by the insertion of the name
Gowanlock in lieu of that of Mr. Robins, who had been pro-
motion was read a third time and passed.

The by-law is set out post p. 483.

Meeting held 28th May, 1883.—All the members present.

Moved by Mr. Woods, seconded by Mr. Sheppard :

“ That the Messrs. Robins Bros. be instructed to re-write
a special set of books, and have the same ready for next
council.”

At a special meeting held 16th June, 1883.—Present, councillors Woods, Frankish, Morrow, and Sheppard (in the chair.), it was moved by Mr. Woods, seconded by Mr. Morrow :

“That whereas Messrs. Robins Bros. have commenced an audit of the books of the municipality, and have proceeded with the same until near completion, and unless said audit be completed their labour in respect to the same will be lost, and the commission of enquiry into the finances will be required to go over the same ground.

Be it therefore resolved, that Messrs. Robins Bros., so far as they may, without interfering with the commissioner, be instructed to complete the said audit, and to lay all information respecting the same, and the result thereof, before the commissioner when requested by him so to do. *Carried.*

The invalidity of this meeting was admitted, but at a meeting held on the 25th June, 1883, all the members being present, it was moved by councillor Woods, seconded by councillor Sheppard, and resolved :

“That the minutes of the special meeting held on the 16th inst. be, and the same are hereby confirmed, and that the solicitor, Mr. Rose, be instructed to attend all meetings of the commission * * and Messrs. Robins Bros. to complete the audit as hereby instructed.”

Communications—Messrs. Robins Bros. asking extension of time for their report.

Moved by councillor Sheppard, and seconded by councillor Woods, and resolved, “that this council do now adjourn, and stand adjourned until Thursday evening, the 28th inst., in order to receive the books and report from Messrs. Robins Bros., and that a copy of this resolution be sent to Messrs. Robins Bros., and also a copy to the commissioner, Mr. Blakely. *Carried.*

Meeting held 28th June, 1883. —All the members present.

After considerable discussion with reference to the report of Messrs. Robins Bros., it was moved by Mr. Woods, and seconded by Mr. Sheppard, that this discussion be allowed to remain over for the commissioner to settle. *Carried*, the Reeve voting “nay.”

The Council then went into committee of the whole for the consideration of Messrs. Robins Bros.’ report, Mr. Morrow in the chair.

Moved by Mr. Frankish, that the report be accepted. *Carried.*

The committee rose, and reported the following motion : Moved by Mr. Woods, seconded by Mr. Sheppard, that the report of Messrs. Robins Bros. be accepted. *Carried*, Reeve voting “nay.”

The by-law referred to in the minutes passed 21st May, 1883, was as follows :

By-law No- 63 of the Municipality of the Village of Brockton.

“Whereas John McKenzie and William Awde were appointed auditors for the purpose of auditing the accounts of this municipality ;

“And whereas William Awde has resigned ;

“And whereas it is deemed expedient to appoint another auditor with full instructions to have the books, if necessary, re-written, so that an accurate report may be laid before the council ;

“Be it therefore resolved, that William Robins, of the City of Toronto, accountant, be and hereby is appointed auditor in the room and stead of the said William Awde, with instructions, if necessary, to re-write the books, and do such work as may be necessary to enable the auditors to

bring in a report to the council at the earliest possible date, so as to enable the council to finally audit the accounts.

"In witness whereof the seal of the corporation has been affixed hereto, and the reeve has hereunto set his hand, this 21st day of May, A. D. 1883."

Moved in amendment in committee of the whole, by councillor Shepard, that the name of James Gowanlock, of the Village of Brockton, be inserted as auditor, in lieu of that of William Robins, and that the by-law be reported in that form, it being in the opinion of this committee inadvisable for Mr. Robins to audit the books, he having re-written the same.

(Signed) F. B. MORROW,
Chairman Committee of the Whole.

Adopted in Council 21st May, 1883.

(Signed) JOHN McCONNELL, M.D.,
Reeve.

(Signed) EDWIN A. MUMFORD, *Clerk.*

The commission appointed by the Government held its sittings. There was contradictory evidence as to whether the plaintiff's report was or was not used on this investigation. I think the evidence preponderates that it was used.

The plaintiffs also claimed \$70.00 for their work and labour in assisting the council to strike a rate for 1883.

The accounts were in a bad state, and unusual difficulty was created by the fact that rates had to be struck on the local improvement principle, &c.

On 24th September, 1883, a resolution was passed that the clerk be authorized to secure the assistance of some competent accountant to arrange the receipts and expenditure so as to enable the council to strike an equitable rate.

On the 9th October the reeve writes to the plaintiffs to meet the clerk and defendants' solicitor, hoping that they would be able to strike a satisfactory rate.

The clerk was examined, and proved the various communications, and says that considering the state of the accounts, the \$70.00 was reasonable.

It appears that the council in these proceedings were acting under the advice of their solicitor, Mr. Rose.

There is a small item of \$4.37 which does not seem sufficiently proved.

The defendants deny all legal liability.

I find that the council acted in good faith, and employed plaintiffs to perform work proper and necessary for them to perform in the regular course of their duty.

In accordance with the principles that seem to have guided our Courts for many years, I think the plaintiffs here ought to recover.

I must leave it to an appellate Court to decide whether work and labour which the municipality have accepted and

received the benefit of can in no case be recovered, unless there be an express contract under seal for the performance thereof

In such cases as *Perry v. Corporation of Ottawa*, 23 U. C. R. 391, *Brown v. Corporation of Belleville*, 30 U. C. R. 373, it seems to have been considered that work proper to be done, if accepted under a resolution of the municipality, could be recovered.

The work done here, that is, the examination of a confused and unintelligible mass of municipal accounts, was necessary to enable the defendants rightly to perform their duties. In *Haigh v. N. Bierley Union*, E. B. & E. 873, Erle, J., so held.

Resolutions of the council are here proved clearly recognizing that the work was to be done, and was being done by plaintiffs for this proper purpose.

The by-law of 1883 clearly states the plaintiff was re-writing the books for the council, and affords evidence as potent as a sealed contract of his employment for that purpose.

I think that between the resolution and the by-law I may hold the principal claim to be proved by legal evidence. The amount seems large, but on the evidence, which is not contradicted, I think I must allow it, \$620.

The item of \$70 for striking the rate rests almost wholly on the resolution.

I think, as the law has been expounded, I ought to allow it.

I do not find in *Silsby v. Dunnville*, either in the Common Pleas, 31 C. P. 301, or in the judgment in Appeal, 8 A. R. 524, any express ruling against the view I take.

The late English cases are governed by the Imperial Statute requiring all contracts over £50 to be under seal.

No doubt there are remarks to be found as to the general necessity of seal or by-law.

As already stated, I think it must be left to an Appellate Court to give us some clear direction on the point.

I give judgment for plaintiff for \$690. I do not allow any interest.

I am unable to see how the fact of the commission to examine the accounts, and the apparent opposition of some of the ratepayers, can affect the decision.

November 25, 1884, *C. Robinson*, Q. C., with him *Alan Cassels*, for the defendants, moved to set aside the judgment and enter it for the defendants. The contract sued on

is not one of such trifling importance and frequent recurrence in municipal affairs as to come within the exceptions to the general principle that municipal councils must exercise their powers by by-law: 46 Vic. ch. 18, sec. 284 (O).; *Hunt v. Wimbledon*, L. R. 4 C. P. D. 48; *Silsby v. Dunnville*, 8 A. R. 524; *Young v. Corporation of Leamington*, 8 Q. B. D. 579, 8 App. Cas. 517. At the time the plaintiffs were verbally and without authority directed by some members of the Brockton Council to do the work, there were resolutions of the council in existence directing the regular auditors to do it. The reference in by-law 65 stating that the plaintiff William Robins had "re-written the books," is incorrect in fact, as is shewn by the dates and items of the account sued on; and moreover, even if it be deemed an incontrovertible admission of such a fact, it does not follow that it admits or impliedly recognizes authority to perform such work for the defendants. The plaintiffs' account shews that they became aware when a very small portion of the work had been done that a large section of the Brockton ratepayers were opposed to their doing the work, and considered it needless expense. The plaintiffs continued the work after that time at their own risk after conferring with the deputy of the Attorney-General. The evidence shews that the Ontario Commissioner was on behalf of defendants notified not to use the plaintiffs' audit. There is no reason why defendants should have to bear the expense of two investigations of the accounts because certain members of the council, without authority and in defiance of the resolution of the ratepayers, assumed to employ the plaintiffs.

D. E. Thomson and T. T. Porteous, contra. The work done by the plaintiffs being work which it was necessary for the corporation to do, and which they ordered the plaintiffs to do, and which they accepted and received the benefit of, renders them liable to pay therefor without a contract under the corporate seal of the municipality: *Bartlett v. Amherstburg*, 14 U. C. R. 152; *Fetterly v. Russel and Cambridge*, 14 U. C. R. 433; *Pim v. Ontario*,

9 C. P. 304; *Perry v. Ottawa*, 23 U. C. R. 391; *Brown v. Lindsay*, 35 U. C. R. 509; *Brown v. Belleville*, 30 U. C. R. 373; *McBrian v. Water Works Commissioners for Ottawa*, 40 U. C. R. 80; *Gibson v. Ottawa*, 42 U. C. R. 172; *Armstrong v. Garafraxa*, 44 U. C. R. 515; *Wright v. Sun Mutual Life Ins. Co.*, 5 A. R. 218; *Dillon on Municipal Corporations*, 2nd ed., vol I. sec. 132-374. The case is clearly distinguishable from *Silsby v. Dunnville*, in Appeal, 8 A. R. 524. In that case the corporation had not received the benefit of the engine in question, and besides the evidence shews that the contract for acceptance was made on the assumption that the by-law then before the ratepayers would be carried. It is also distinguishable from *Hunt v. Wimbleton* and other English cases cited, because these were decided upon a clause of the statute in England which is not in force here; and even if evidence under seal of the plaintiff's engagement were necessary that evidence is sufficiently afforded by the terms of the by-law, which recites that the plaintiffs were doing this work for the corporation.

January 6, 1885. O'CONNOR, J.—Brockton was incorporated as a village in 1881, and in 1883 it was found that its financial affairs were in "a mixed up condition," owing to the irregular manner in which the business of the municipality was transacted and the books kept. This gave rise to dissatisfaction amongst the ratepayers, and differences in the council. The solicitors of the corporation advised that the plaintiffs, professional book-keepers in Toronto, should be employed to examine, write up, and arrange the accounts and books of the corporation, and place them on a proper footing, and then report the result of their work to the council.

Four members of the council agreed to do this; but the reeve, backed up apparently by some of the ratepayers, preferred that a commissioner should be appointed by the Provincial Government, under the provisions of the statute in that behalf, to investigate the accounts and books and

arrange the difficulties. In this divided state of things the four councillors proceeded to arrange with the plaintiffs, and after some discussion with them, and consultation between themselves, they did arrange with and employ the plaintiffs to perform the services referred to.

About the same time, or shortly afterwards, the reeve had communication with the Attorney-General, and procured the appointment of a commissioner; but before he was ready to enter on the execution of the work required to be performed by him the books had been placed in the hands of the plaintiffs, and it appeared that they had commenced the work.

The plaintiffs appeared to have made their first report on the 28th of June. In the interval between the employment of the plaintiffs and the date last mentioned there appears to have been a good deal of jarring between the reeve on the one hand, and the four councillors on the other. At several full meetings of the council the reeve refused to countenance resolutions proposed by councillors, and when carried against his will he refused to sanction or authenticate them by his signature.

At the conclusion of an irregular by-law, of a rather confused character, passed on the 21st of May, reference was made to William Robins, one of the plaintiffs, as "having re-written the books" of the municipality.

It was, as it appeared, inexact to say that he had re-written the books at that time, although they were probably only in course of being re-written, but the expression is nevertheless, I think, a recognition by the corporation under their seal of the work, and, by implication, of the fact that William Robins at least had been employed to perform it. William Robins was, in fact, the acting man for the firm in the whole affair; that is, he was the member of the firm with whom the arrangement was made, and who performed or superintended the performance of the work, and helped at it himself. The work was commenced on or soon after the 14th May. Between that and the 28th June, several interviews took place at the office of the

plaintiffs between William Robins and members of the council, sometimes accompanied by officers of the council, at which papers were examined, instructions given to Mr. Robins, and explanations made by him regarding the work as far as it had been done, and the mode or plan adopted.

Enough appears on the minutes of the council in evidence to shew that the plaintiffs were employed by a majority of the council: that the books, papers, and vouchers of the corporation were placed in their hands for the purpose of enabling them to perform the work required: that they were engaged upon the work, and finally they were notified by a letter from the clerk of the corporation, dated June 25th, that the council had adjourned "until Thursday evening, the 25th inst., in order to receive the books and report from Messrs. Robins Bros., and that a copy of this resolution be sent to Robins Bros., and also a copy to the commissioner, Mr. Blakely."

The work done by the plaintiffs was of a kind that the commissioner would have had to perform if it had not been done by another, and he adjourned his proceedings to wait for the plaintiffs' report, and for the books and papers of the corporation, which were in the plaintiffs' hands.

It further appears that the commissioner consulted the plaintiffs, and received explanations regarding the work they were performing, and that he afterwards used the results of their work in his own proceedings.

After the commissioner had finished his work the council, including the reeve, employed the plaintiffs to assist them to strike a special rate on the municipality, and among the items levied was a sum which was intended to cover payment to the plaintiffs for their work; and it was argued that they were able to give that assistance without preparation and for a comparatively small remuneration, because of the knowledge they had acquired of the financial affairs of the corporation in the course of their previous investigation.

Ultimately, however, the corporation refused to pay the plaintiffs for their work, and hence this action.

The defence is rested mainly on the ground that the plaintiffs were not employed under a by-law or by agreement under the corporate seal to perform the work, and therefore that the corporation is not liable in law. In support of this position the cases of *Silsby v. The Corporation of Dunnville*, in our Courts, 8 A. R. 524, and of *Young v. The Corporation of Leamington*, in the English Courts, 8 Q. B. D. 579, 8 App. Cas. 517, are cited.

The learned Chief Justice, who tried the case, found the facts nearly as above summarized in favour of the plaintiffs, and gave judgment in their favour for the amount claimed, except one inconsiderable item.

Down to the year 1875 a series of decisions had established a principle of law, as an exception to the general rule that a corporation, especially a municipal corporation, can be bound by contract only under its corporate or common seal, under which exception the defendants in this case would be held liable.

The principle of that exception was, that where work had been performed for the corporation within the scope of their requirements and duties, and they accepted and had the benefit thereof, they were liable to pay for such work and the materials, if any, necessarily used therein.

The case of *Haigh v. The Guardians of North Bierley Union*, reported in E. B. & E. 873, was similar to the present case in its circumstances and facts.

It was the case of an accountant employed for a purpose similar to that for which the plaintiffs were employed in the present case.

The plaintiff in that case was engaged, and his work accepted and utilized by the corporation, but there was no contract or By-law under the corporate seal authorizing the engagement or acceptance. Erle, J., in delivering the judgment in that case, said: "*Sanders v. St. Neot's Union*, 8 Q. B. 810, and *Clarke et al. v. The Guardians of the Cuckfield Union*, 1 L. & M. 81, S. C., 21 L. J. Q. B. 349, seem to me to have decided that an action lies against the guardians of an union to recover money for work and

labour, though performed under a contract not under seal." "In the present case," he adds, "the work and labour had been performed, and was performed at the request of the guardians, and was, in my opinion, incidental to the purposes for which the guardians were created. They had appointed a proper officer to manage the union accounts; they had reason to suspect that he had been guilty of fraud and embezzlement, and by their first resolution they appointed the plaintiff as an accountant to give them information upon this point. Such an appointment was clearly for a purpose within the general scope of their functions as guardians, namely, that of protecting the funds of the Union."

Here it was the duty of the council not only to protect the funds of the corporation, but to superintend its affairs; to see that proper accounts were kept, and that the transactions of and relating to the corporation were duly recorded by the proper officers appointed for such purposes; and if those officers failed through ignorance, neglect, or dishonesty, to perform those duties in a proper manner, they had the power, and it was their duty to employ a competent person, or persons, to investigate those matters, and adjust what they found wrong as far as skill could do so. Such was manifestly the case in this instance, where the affairs of the corporation were in so complete "a muddle" as they are described to have been. The law on this subject appears to have continued in the same state in England down to 1875, as before stated.

In this country also a long course of decisions almost uniform, founded on English cases, and afterwards running parallel with the main current of the English authorities, seems to have established the law on the same footing down to the case of *Silsby v. The Corporation of Dunnville*, 8 A. R. 524.

The decision in that case has been regarded by some members of the profession as having disturbed and changed the law on the subject under consideration. I cannot accept that view, and I think the learned Chief Justice who tried

the case properly distinguished that case in his judgment herein. In that case the plaintiff sought to recover the price of a fire engine. In that case, as in this, it appears there were two parties of the municipality in opposition to each other; one preferring the Silsby engine, of American manufacture, the other the Ronalds engine, of Canadian manufacture. On the 5th November the council of the corporation published a provisional by-law, instead of a former invalid one, to be voted on by the ratepayers on the 28th November, to make provision by a rate on the property of the municipality for payment of an engine. But this by-law was rejected by the ratepayers.

Prior to this the plaintiff, having been informed that the corporation required a fire engine, tendered to supply one of their engines, and the tender was accepted by the council on the terms proposed.

The engine arrived in Dunnville consigned to the reeve, and was put in the engine house, before the substituted by-law was voted on.

On the 24th November the engine was, by instructions of the council, accepted on condition that the guarantee and terms of the contract would be carried out by the plaintiffs.

The resolution accepting the engine was, however, after the rejection of the by-law, on the 28th November, rescinded, and the company were afterwards notified to remove the engine.

The defence to the action set up and relied upon was, substantially, that the acceptance of the tender to supply the engine, and the acceptance of the engine subsequently consigned to the reeve, were not under the corporate seal; and in fact that there was no absolute acceptance, formal or informal. The want of a by-law to authorize the levy of a rate for the payment of debt not within the ordinary expenditure of the corporation for the year, was also pleaded and insisted on.

The want of the by-law in that case appears to me to present an insuperable obstacle to the plaintiffs' recovery.

Subsec. 27, of sec. 466, ch. 174. R. S. O., empowers the council to pass a by-law for appointing fire wardens, fire engineers and firemen, &c.; but it does not explicitly, nor does it seem to implicitly, give them authority to procure engines, or to authorize the procurement of them, by by-law or otherwise; and it is not asserted that the council had such power otherwise.

The resolutions of the council would then, with or without seal, be *ultra vires* of the powers and authority of the council, and void.

Besides this, the evidence of acceptance by the council was not, I think, conclusive; and the engine had never been used by or on behalf of the corporation.

In at least one other important respect this case differs from *Silsby et al. v. Dunnville*, namely, that the defendants have had the benefit of the labour of the plaintiffs, and the corporation have been saved the amount claimed by the plaintiffs, or possibly a greater amount, which it is probable they would have incurred if the commissioner had performed like work, which it appears he would have had to perform to enable him to execute his commission properly.

It therefore, in my judgment, falls within the rule laid down by Erle, J., in *Haigh v. North Bierley Union*, as already stated.

I think the defendants' order *nisi* should be discharged, with costs.

Recurring to the English cases on this subject, it may as well be remarked that *Young v. Leamington*, 8 App. Cas. 517, occurred after an Act of Parliament, 38 & 39 Vic. ch. 55, had passed, which, in one of its clauses, sec. 174, enacted:

1. "Every contract made by an urban authority, under this Act, whereof the value or amount exceeds £50, shall be in writing, and sealed with the common seal of such authority."

2. "Every such contract shall specify the work, materials, &c.

3. "Before contracting the urban authority shall obtain from their surveyor an estimate, &c., with particulars of annual expense of repairs," &c.

4. "Before any contract of the value of £100 or upwards is entered into by an urban authority ten days public notice at the least shall be given expressing the nature and purpose thereof, and inviting tenders for the execution of the same; and such authority shall require and take sufficient security for the due performance of the same."

These statutory directions and conditions are expressed in imperative language, and are doubtless imperative and were intended by the Legislature to operate as a salutary, if not indeed as a necessary, protection to the corporation.

In the House of Lords, in *Young v. The Corporation of Leamington*, 8 App. Cas., at p. 518, counsel for the respondent, commenting on prior cases, say: "Down to *Clarke et al. v. Cuckfield Union*, the current of authority was not uniform, but that has been the starting point of a uniform series of decisions, making three classes of exceptions to the rule that contracts of a corporation must be under seal (1) where the contract is executed; (2) in small matters (3) where it is impossible to affix the seal in time."

Brett, L. J., in delivering judgment, says, at p. 526: "We ought in general * * to assume that the Legislature knows the existing state of the law; and in the present case I have no doubt that in fact those who prepared the Act of 1875 knew of the differences of opinion that had been expressed, and the difficult questions that might yet have to be decided, and really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating. I think, bearing in mind this, it is not possible to construe section 174 as meaning anything else than that when the subject matter of a contract exceeds £50 in value, the contract must be under seal."

Blackburn, L. J. says, p. 522: "In a case like that before us, if we were to hold the defendants liable to pay for what

has been done under the contract, we should, in effect, be repealing the Act of Parliament, and depriving the rate-payers of that protection which Parliament intended to secure for them."

It is, therefore, clear that the decision in *Young v. Leamington* was a new departure founded, not on the authority of previous decisions, but on the Act of Parliament then recently passed with reference to urban authorities, and to those only.

WILSON, C. J.—The Municipal Act R. S. O. ch. 174, sec. 277, declares the powers of the council shall be exercised by by-law when not otherwise authorized or provided for, and by sec. 281 every by-law shall be under seal.

In *Silsby v. Dunnville*, 8 A. R. 524, the case was decided partly on the non-acceptance of the engine; and the agreement or arrangement, or whatever it may be called, between Silsby and the village, was based upon a by-law being voted upon by the ratepayers to buy the engine, but that by-law was defeated. Notwithstanding these special grounds in that case, it appears to me the true rule of law is, that work such as the plaintiffs rendered in this case should be directed to be done by by-law, and properly the plaintiffs should have been appointed by by-law to do that work.

ARMOUR, J., concurred with O'CONNOR, J.

Order nisi discharged, with costs.

[CHANCERY DIVISION.]

FERRIS V. FERRIS (a).

*Action for Alimony—Desertion—Offer to return—Pleading—Costs—R.
ch. 40, sec. 48.*

In an alimony action the defendant in his defence alleged that he refused, and still refused, to support the plaintiff by reason of her having committed adultery with M. At the trial it appeared that the plaintiff, on being charged by the defendant with adultery, and ordered to go away, left his house, though, before she actually departed, he forbade her to go. The defendant persisted in the charge of adultery but did not attempt to prove it. The plaintiff proved none of the acts of violence alleged in her statement of claim.

Held, that the statements in the defence, taken in connection with the above facts, must be treated as sufficient proof of desertion on his part and he must be taken to have dispensed with the necessity for the plaintiff offering to return.

The defendant having, at the trial, after the plaintiff's evidence had been given, for the first time offered to take her back to his house.

Held, that the judgment for alimony should stand over for six weeks to see if this offer was carried out, and that the plaintiff was, in any event, entitled to her full costs of suit.

THIS was an action for alimony brought by Janet Ferris against her husband Archibald Ferris.

In her statement of claim the plaintiff set up her marriage with the defendant on July 14th, 1865, and their subsequent residence together until lately: and then proceeded to allege various kinds of ill-treatment received by her from the defendant from about the year 1867 up to September, 1882, since which time she and her husband had been living apart; she also specified certain property belonging to her husband, and she claimed a declaration that she was entitled to alimony and further relief.

In his statement of defence the defendant alleged the adultery of his wife as his cause for refusing to support her as in the judgment mentioned. The rest of the facts of the case sufficiently appear in the judgment.

(a) This case is reported chiefly on account of the holding as to costs. The question of the power of the learned Judge to grant full costs to the plaintiff, notwithstanding R. S. O. c. 40, s. 48, was not argued before him, but he considered he had the power, and made the order accordingly. The case has not been reported before, owing to this point having escaped notice.—REP.

The case was heard at Orangeville, on October 9th and 10th, 1883, before Osler, J.A.

At the close of the plaintiff's evidence :

Ritchie, for the defendant, submitted that no case had been made. The wife was not justified in leaving her husband's home : see *Rodman v. Rodman*, 20 Gr. 428 ; *Edwards v. Edwards*, *Ib.*, 392 ; *Smallwood v. Smallwood*, 2 Sw. & T. 397 ; *Plowden v. Plowden*, 18 W. R. 902. The defendant is now willing to give the plaintiff a home and to support her. She should have gone back when he asked her.

Meyers, for the plaintiff, contra.

November 2nd, 1883. OSLER, J.A.—This was an action for alimony tried before me at Orangeville, at the Autumn Assizes for 1883.

There was no evidence of any of the acts of violence charged in the statement of claim.

But in the statement of defence the husband alleges "that prior to the commencement of this suit, and still, he refuses to support the plaintiff by reason of her having committed, as in fact she did, adultery with the said W. P. McDonagh." At the trial he persisted in this charge, though he offered no evidence of it, and though the wife denied it, and I find it in fact not proved.

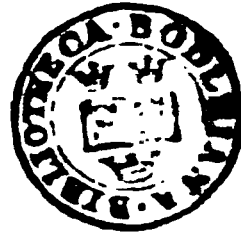
I do not see why his statement, taken in connection with these facts, should not be treated as sufficient proof of desertion on his part, notwithstanding the fact that the wife on being charged by him with adultery, and ordered to go away, left his house, after having been forbidden to do so (b). She was wrong in doing that, but it seems to me that he has dispensed with the necessity of her making an offer to return.

(b) It appeared that the plaintiff left her husband's home on one of the occasions when he was using abusive language to her, and he on that occasion told her that he did not want to have her in the house, but before she actually left he forbade her going.

At the trial it was said that the husband was willing to receive back and to support his wife. If I thought, which I do not, that this offer was *bond fide*, and made with the honest intention of being carried out, I suppose the proper order would be, to dismiss the action upon its appearing that the husband had done on his part all that he could do to carry it out, and I will still leave this open to be done, so that if possible the parties may come together again with their children, and endeavour to live peacefully together.

This may be shewn to my satisfaction by affidavit or depositions within say a month or six weeks. But failing any arrangement of this kind, the wife is, I think, entitled to her alimony, and in any event to her full costs of suit (c).

A. H. F. L.



(c) On the certified copy of the pleadings, the learned Judge endorsed the following : " I find the plaintiff entitled to alimony by reason of her desertion by her husband, the defendant, and refer it to the Master at Orangeville to ascertain, fix, and report upon a proper sum, having regard to the property of the husband and the station in life of the parties, to be allowed to the plaintiff for alimony. The decree is not to be taken out for six weeks, to enable the defendant to receive back, and to maintain the plaintiff as his wife, or to make it appear that he is ready and able to do so.

(Signed), F. OSLER.

November 2, 1883.

Affirmed. 13 C. S. C. R. 255 -
 [CHANCERY DIVISION.]

LANGTRY ET AL. V. DUMOULIN ET AL.

Trust in favour of Church—Evidence—Journals of Parliament—Proof of status as rectors—Construction of Statutes—Constitutional law—29-30 Vic. ch. 16—Imp. 31 Geo. III. ch. 31—Imp. 3-4 Vic. ch. 35—Imp. 17-18 Vic. ch. 118.

The Act 29-30 Vic. ch. 16, being an Act to provide for the sale of the rectory lands of this Province, is *intra vires* and valid, the Imperial Act 17-18 Vic. ch. 118 having removed the restrictions upon legislation on such subject matter, formerly existing by force of 31 Geo. III., ch. 31, and Imp. 3-4 Vic. ch. 35.

Certain alleged copies of Journals of Parliament were tendered in evidence. It was not proved that originals of which the copies tendered were said to be copies ever existed, nor was it shewn that the copies tendered were copies of any original. They were, however, shewn to have come from the Parliamentary library at Ottawa, and most of them purported to have been printed by the Queen's printer.

Held, that, in the absence of a statute making them admissible, they could not be received.

When certain persons sued as incumbents of certain rectories belonging to the Church of England in this Province, and it was objected that the constitution of the said rectories had not been legally proved,

Held, that evidence as to the possession or occupancy by the plaintiffs of their respective Churches, and as to their officiating according to the rules of the Church as persons having the cure of souls, and of their recognition by the Church Society or Synod, was admissible as some evidence of their *status* as such rectors.

In construing a statute it is not admissible to resort to the preamble, if the words of the statute are plain.

Held, on the whole case, which was an action brought by certain clergymen of the Church of England in the City of Toronto, for the purpose of having it declared that the defendant D. was a trustee for them as to certain lands by virtue of 29-30 Vic. ch. 16, and certain subsequent statutes, conveyances, and transactions, that the plaintiffs were entitled to the declaration asked for, and that such lands were within the description of lands in sec. 1 of said Act.

Certain evidence offered to prove the contents of a Canon of the Church Society or Synod discussed.

THIS was an action brought by thirteen clergymen of the Church of England, resident in the City of Toronto, and the Incorporated Synod of the Diocese of Toronto, against the Reverend J. P. Dumoulin, incumbent of St. James, in Toronto, and certain other defendants, claiming a declaration that the defendant Dumoulin was a trustee of certain lands and premises for certain purposes stated by them, and also claiming an account, a receiver, and an injunction.

The facts of the case are set out in the judgment.

The trial was commenced on June 11th, 1880, before Ferguson, J., and certain witnesses were examined (a).

(a.) The first witness examined was the Rev. J. P. Doumoulin. Mr. W. P. Atkinson, secretary of the Synod of the Diocese of Toronto, was then put into the box. Before his examination commenced, however; counsel for the defendants took objection that the constitution of the rectories, whereof the plaintiffs were alleged to be the incumbents must be proved legally, and objected to evidence of usage or conduct as between the so-called rectors and the Synod being admitted.

S. H. Blake, Q. C., and *B. B. Osler*, Q. C., for the defendants, cited *Attorney General v. Grasett*, 5 Gr. 412, S. C. in App. 6 Gr. 200; *Doe d. Green v. Friesman*, 1 U. C. R. 420; *Burn's Eccles. Law*, vol. 1, p. 136, (Benefice); *Martin v. Kennedy*, 2 Gr. 86, S. C. in App. 4 Gr. 61; *Sanson v. Mitchell*, 6 Gr. 582; *Kirkpatrick v. Lyster*, 13 Gr. 323, S. C. in App. 16 Gr. 17; *Henderson v. White*, 23 C. P. 78; *Lundy v. Tench*, 16 Gr. 597; *Attorney General v. Lauder*, 9 Gr. 461.

J. MacLennan, Q. C., and *J. Bethune*, Q. C., contra, cited *Taylor on Ev.*, 6th ed., pp. 173, 174; *In re The Lord Bishop of Natal*, 3 Moo. P. C. N. S. 115; *Long v. Bishop of Cape Town*, 1 Moo. P. C. N. S. 411; *Bishop of Natal v. Gladstone*, L. R. 3 Eq. 1.

FERGUSON, J.—An old case is referred to in 3 Wils. 366, in which a prebendary who had brought ejectment to recover a house built on his prebendal site was called upon to prove presentation, institution, and induction as well as some other then requisites, but the Chief Justice Wilmot ruled, saying, "Those shall be presumed upon sound principles of law." The learned Judges in that case, however, cited many cases that are strongly the other way, seeming to think the matter not very clear. The case *Doe d. Green v. Friesman*, 1 U. C. R. 420, is certainly a direct authority showing that at that time under the circumstances then existing presentation, institution, and induction must be proved in ejectment. In *Henderson v. White*, 23 C. P. 78, the defendant was simply on the horns of a dilemma, and the Court did not decide the question. It was an ejectment. After a very long search for authority on the point raised, and considering as well as I can all that I have found, I think I should not reject the evidence, for it may be that when the existence of the parishes in Toronto is shown, occupancy or long occupancy, or possession by the rector taken in conjunction with the other circumstances spoken of, afford a presumption and *prima facie* evidence of presentation, institution, and induction, for I find in *Roger's Eccles. Law* (kindly lent me by Mr. Armour,) a reference to a case in which it was held that fifteen years possession was *prima facie* evidence of a regular induction to a benefice, as well as of some other rites or formalities. I do not find any case referred to in section 139 of *Taylor on Evidence*, mentioned by Mr. MacLennan, on

the subject. This section and the law contained in it are familiar to every *nisi prius* lawyer, but I have never known or heard of its being applied to a case of this kind.

I think it is my duty to receive what I understand to be the kind of evidence offered on behalf of the plaintiffs, subject to the objections raised, with leave to cross-examine without waiver of the objection, and without at all, at present, committing myself to the proposition that it will, even though no opposing evidence be given, prove a case, or an element of a case for the plaintiffs or any of them. I think I must receive evidence of the plaintiffs being in possession of churches of the Church of England in Toronto, and officiating according to the rites of that church as persons having the cure of souls, of the respective durations of such possession, and of their recognition by the Church Society or Synod, as the case may have been, as some evidence of *status*. If the plaintiffs fail to show that the respective places are parishes or rectories, within the meaning of the words that occur in the statement of claim, or as required by the title, that *may* be fatal to them.

At a late stage in this case, counsel appearing to assume that the above ruling made the existence of parishes a condition precedent to induction, the learned Judge observed that such was not his intention.

Further difficulty arose in the course of the trial in respect to the proving of the canon forming the parishes of which the plaintiffs, other than the Synod, assumed to be rectors. The plaintiffs endeavoured to supply the necessary proof by producing a certain deed dated November 10th, 1862, in which was recited the canon in question, and which was put in, and marked as exhibit "C;" also by producing a minute book of the Synod, which was marked as exhibit M. 1, containing the canon on "the division and formation of parishes," authenticated by the original signature of the Bishop, and the late Dr. Lett, the secretary of the Synod, and also an amendment of the same canon, attested in the same manner, the original canon being dated 1858, and the amending one 1859; also by producing various books recording the proceedings of the Synod, and marked respectively as exhibits Q. 1, R. 1, N. 1, and G.; and in other ways which are sufficiently stated in the following ruling of the learned Judge.

October 12th, 1883. FERGUSON, J.—It is contended, on the part of the defence, that it has not been shewn that the alleged canons, the one relating to the division and formation of parishes, and the amendment of it, copies of which are said to be in book marked M. 1, the proof of which is the subject of the present discussion, were ever passed by the Synod at all. On the part of the plaintiffs, it is urged that the evidence of the Reverend Mr. Langtry shews this. This witness did say that he remembered quite distinctly a canon being passed respecting parishes. Objection was then made to his giving any evidence as to the contents of that canon, and the objection was sustained. I then suggested that an effort might be made to identify the canon meant by date or otherwise, without giving evidence of its contents as such, but this suggestion was not acted

upon. Afterwards, the deed marked "C" was produced, which, it was said, recited the fact of the passing of a canon, and the same witness was asked if he was present when the canon so recited was passed? This was objected to, and I was of the opinion that it was only another way of endeavouring to give in evidence the contents of the canon referred to. No other evidence was relied on as shewing the fact that the canons in question were passed by the Synod. I do not think that this sufficiently proves it, and it cannot be said that a paper appearing to be a copy shews that an original once existed. As to the entries in the book that are offered in evidence, so far as their reception was urged on the ground of their being copies, Dr. Hodgins, in his evidence, says that copies of the original manuscripts were printed, and that those printed copies were copied into the books, and that what was so copied into the books was signed by the Bishop and Secretary. The signatures do not appear at each item, but only at the end of a session's proceedings. He gives this as a description of the manner in which the work was done. This method, he says, was discontinued before the death of the late Bishop Bethune, on account of the expense. He says that the manuscripts and proofs were usually returned by the printer to the secretary, and that latterly the manuscripts were put into the form of a book for preservation. This, according to his evidence, seems to be the method pursued in respect of the resolutions and canons of the Synod. There is no evidence as to how these particular entries were made in the books, but if it be assumed that the entries were made according to the method of proceeding stated by Dr. Hodgins, they are not copies of any original, and there is no sworn testimony that they are accurate copies of anything. As to the sufficiency of the search proved to have been made for the original canons (*Taylor on Evidence*, 6th ed., sec. 399,) it said that the object of this kind of proof is to establish a reasonable presumption of the loss of the instrument, and as this is a preliminary inquiry addressed to the discretion of the Judge, the party offering secondary evidence need not be in a position to negative every possibility of the original being kept back. I think I would hold the proof of search sufficient if proper secondary evidence were offered, but for the reasons I have stated I am of the opinion that what has been offered as secondary evidence cannot be received, even if it were proved that the original once existed. It was also contended for the plaintiffs that these entries were good original evidence, inasmuch as they were signed by the Bishop and Secretary in the book. It is known that these entries are not the original resolutions or canons. No authority by statute, by-law, authorized regulation, or otherwise, was referred to, shewing that the signature of the Bishop and Secretary had the effect contended for, and I am of the opinion that they had not. It was also argued that the entries in question had relation to matters of internal arrangement, and are binding upon the component parts of the Synod, of whom the defendant Dumoulin is one, and that the entries are for this reason good evidence against him. No authority was referred to in support of this proposition, and I am unable to perceive that it is correct. It is not contended that the books marked Q. 1, R. 1, N. 1, and G., are, or

that any of them is an original, and it has not been shewn that the parts of them offered in evidence are accurate copies of any original. I am of the opinion that the evidence offered cannot be received.

Afterwards, on the motion of Bethune, Q. C. for the plaintiffs, other than the Synod, this ruling was opened up as to the whole of it, he saying that he desired to place the matter upon a different legal footing. Finally it was merged in the general argument of the case at the close of the evidence.

The case was then adjourned from time to time by the learned Judge, and the evidence being closed, it was finally argued on February 4th, 5th, 6th, and 7th, 1883.

J. Bethune, Q. C., for the plaintiffs other than the Synod (*b*). As to the position of the plaintiffs, the mere fact of possession is *prima facie* evidence of all having been done necessary to induction, or to constitute them "incumbents." As to the minute books of the Synod they are good evidence as between the parties here: *Lumley* on By-laws, 251, 253; *Angell & Ames* on Corp., 11th ed., sec. 368; *Field* on Corp., sec. 392; *Taylor* on Evid., 7th ed., p. 1484; *Scully v. Scully*, 10 Ir. Eq. 557. I refer also to *Doe d. Jones v. Jones*, 10 B. & C. 718; *Hickson v. Collis*, J. & L. 94; *Regina v. Burah*, 3 App. Cas. 883; *Regina v. Hodge*, 9 App. Cas. 117; *Maxwell* on Stat., 1st ed., pp. 2, 3, 16; *Attorney-General v. Master of Brentwood School*, 1 M. & K. 376; *Attorney-General v. Mayor of Rochester*, 6 Sim. 273; *Attorney-General v. Love*, 23 Beav. 499.

J. MacLennan, Q. C., and *H. Cameron*, Q. C., for the Synod. The Church is now a mere voluntary association in the colonies: *Long v. Bishop of Capetown*, 1 Moo. P. C. N. S. 411; *In re The Lord Bishop of Natal*, 3 Moo. P. C. N. S. 115; *Bishop of Natal v. Gladstone*, 3 Eq. 1. As to the meaning of the statutes, no records from the Crown lands department or from any other department can be looked at for the purpose of determining their meaning.

(*b*) Only those portions of the argument of counsel which touch on matters of general legal interest are noted here. So far as it dealt with the special statutes and deeds in question in this case it is not noted.

To shew that the plaintiffs are incumbents in fact is quite enough in this action. And the word "incumbent" means only one in possession of the church; it has been applied to ministers of the Church of Scotland. The case is really one of administering a portion of the internal affairs of the church on the *cy pres* doctrine; *Tudor's Charitable Trusts*, 2nd ed., p. 266, 272, 287. I also refer to *Attorney-General v. Grasett*, 5 Gr. 412, 6 Gr. 200, 485, 8 Gr. 130.

C. Moss, Q. C., for the Reverend Mr. Darling, one of the city clergy, defendant. It must be remembered the title is no part of an Act; *Maxwell on Stat.*, 1st ed., sec. 5, p. 33; *Salkeld v. Johnston*, 2 C. B. 749; *Farley v. Bonham*, 2 J. & H. 177, and if an enactment differs from the preamble, the former governs: *Maxwell on Stat.*, 1st ed., p. 39. As to the documents sought to be admitted as secondary evidence, as to none is there evidence of the existence of the originals of which they are said to be copies, or of the destruction of those originals. As to the Parliamentary journals they have not been proved. The journal is not a record; it is dead as soon as the Act is passed: *Rex v. Dowager of Arundel*, Hob. 109. I also refer to *Shelford's Real Prop. Stat.*, 8th ed., p. 306; *Black Comm.*, vol. 1, p. 384; *Regina v. Mayor of Liverpool*, 8 A. & E. 176; *Pinder v. Parr*, 4 Ell. & Bl. 105.

A. Hoskin, Q. C., for the defendants, the county rectors.

D. Armour, for the Reverend H. Baldwin, one of the city clergy, defendant.

C. Robinson, Q. C., S. H. Blake, Q. C., B. B. Osler, Q. C. and H. D. Gamble, for the defendant, the Reverend Canon Dumoulin. There are two branches of the case which are entirely distinct, (1) the *cy pres* doctrine, and (2) the rights as shewn by the grants and statutes. As to (1) the Crown created this trust, and the Crown is still living. The cases are cases brought by the Attorney-General: *Jarm. on Wills*, 4th ed., vol. 1, p. 244. The Crown should be a party. We assent however to the application of the *cy pres* doctrine to the case if the plaintiffs will accept it: *Attorney-General v. The Master of Brentwood School*, 1 M. & L. 376. As to

the Act, 39 Vic. ch. 109, O., this is really a private Act interfering with vested rights. As to how such an Act should be construed, we refer to *Hardcastle* on Stat. Law, pp. 38, 93, 267; *Wilberforce* on Stat. Law, pp. 218, 220, 274; *Re Goodhue*, 19 Gr. 366; *Maxwell* on Stat., 2nd ed., p. 363-4; *Greene v. Provincial Ins. Co.*, 4 A. R. 521; *Hinton v. Dibbin*, 2 Q. B. 663. The title of a statute may be referred to in aid of its construction: *Allkins v. Jupe*, 2 C. P. D. 383; *Coomber v. Justices of Berks*, 9 Q. B. D. 17; *Blake v. Midland R. W. Co.*, 18 Q. B. at p. 109; *Johnson v. Upham*, 2 Ell. & Ell. at 263; *Hardcastle* on Stat., 38, 93. As to the preamble, there can be no doubt it is the best guide apart from the enacting words: R. S. O. ch. 1; *Maxwell* on Stat., p. 64. As to the admissibility of the journals and books, are they proved? Credit should be given to the course of conduct of the Court of Parliament. On what principle are reports of American cases received and read here? The journals are not offered as evidence of facts, but only of matters of history. They would not be evidence in ejectment, but as to what was going on or being done in Parliament at a particular time they are evidence: *Wilberforce* on Stat. Law, pp. 107, 141; and they may be looked at as to the history of the general subject matters dealt with: *Taylor* on Evid., 7th ed., p. 1388; *Greenleaf* on Evid., 1883, secs. 48, 482, 491; *Watkins v. Holman*, 16 Pet. 25; *Roof v. King*, 7 Cow. N.Y. 613; *Spangler v. Jacoby*, 14 Ill. 297; *King v. Gordon*, Cowp. 17. But the journals are proved. They came from the Parliamentary library at Ottawa. See *Maxwell* on Stats., 2nd ed. p. 28; *Smiles v. Belford*, 1 A. R. 436; *Aerated Bread Co. v. Gregg*, L. R. 8 Q. B. 355. Then it must be remembered that statutes are not construed according to the technical rules of conveyancers, but according to the popular meaning of the words employed. The *cy pres* doctrine lies at the foundation of the whole case. The Attorney-General should be a party before the doctrine can be applied. Again, should not the debenture holders be heard before the fund is taken away: 37 Vic. c. 92. O.

The Act 39 Vic. c. 109, O. was *ultra vires* ; it was applied for by the Provincial Synod, who had to do with property outside of Ontario: *Dobie v. The Temporalities Board*, 7 App. Cas. 136. It is also *ultra vires* because it did not comply with the requirements of 31 Geo. III. c 31, sec. 42. The later statute repealing that did not by the repeal disturb rights then acquired. On construing the various Acts in question here the surrounding circumstances must be known and taken into account: *Taylor on Evid.*, 7th ed., secs. 1660, 1661; *Gresley on Evid.*, 2nd ed., pp. 114, 115, 392, 403. The Court is not to be oblivious of the history of law and Legislatures; *Holme v. Guy*, 5 Ch. D. 901. As to the admissibility of the books and proceedings of the Synod, the fact of the defendant Doumoulin being in the Synod makes no difference in the admissibility of the evidence. If the case turns on the constitutionality of 39 Vic. c. 109. O., it should stand for the Attorney-General to be notified. We also refer to *Wharton's Law Lexicon*, *sub voc.* " *cy pres*," "incumbent"; *Snell's Eq. Jur.*, 3rd ed., p. 110; *Doe d. Green v. Friesman*, 1 U. C. R. 420; *Tully v. Farrel*, 23 Gr. 49; *Johnson v. Glenn*, 26 Gr. 162.

J. Maclellan, Q. C., for the Synod, in reply. Though 39 Vic. c. 109, O., and the amending Act, 41 Vic. c. 69, are special or private acts, yet they are not to be scrutinised or construed as a Railway Act would be. It is not true to say that these Acts either took away a vested right or destroyed a trust. As to the effects of the title and preamble of an Act, see *Maxwell on Stats.*, 2nd ed., pp. 251-56-62; *Millar v. Smith*, 23 C. P. 47; *Millar v. Salomons*, 7 H. & N. 475, *S. C.* in App. 8 W. H. & G. 778; *Shrewsbury v. Scott*, 6 C. B. N. S. 1; *Metropolitan Asylum District v. Hill*, 6 App. Cas. 193. Parliamentary history cannot be looked at to construe a statute: *Maxwell on Stats.*, 2nd ed., pp. 27, 33. If, under the *cy pres* doctrine, a scheme was to be settled the opinions of the Synod would be adopted. The Master upon a reference would consult the Synod, a body to whom such matters are by law entrusted. As to the debenture holders, there is no

evidence showing whether they have a charge on this fund or only upon the vestry property, and therefore there is nothing to show that they should be parties.

February 20th, 1884. FERGUSON, J.—The plaintiffs are thirteen clergymen of the Church of England living in the City of Toronto and the Incorporated Synod of the Diocese of Toronto. The defendants are the Rev. John Philip Dumoulin, who is the incumbent of the Rectory of St. James, in Toronto, and three other clergymen of the Church of England, in the said city, and also five clergymen of the Church of England, resident in the Township of York, who were added as defendants by amendment at the trial of the cause.

The plaintiffs, amongst other things, state that by a patent dated the 4th day of September, 1820, reciting a former patent dated the 26th of December, 1818, granting unto the Hon. D'Arcy Boulton, the Hon. John B. Robinson, and Wm. Allan, Esq., a certain square of land situate on the east side of Church Street, and on the north side of King Street in the city of Toronto, containing four acres, more or less, for the sole use and benefit of the parishioners of the Town of York forever as a church yard and burying ground for the inhabitants of the said Town of York, and appurtenant to the Church then built thereon; and reciting, also, that it was intended that so much only of the said land as was necessary for the purposes of a church yard and burying ground should be so appropriated, and that such part of the said land as was not so required for the use of the parishioners should be held by the Trustees upon and for the trusts and uses thereafter stated; and reciting, also, that the said Trustees had surrendered and yielded up to the Crown the said four acres of land to the end that by such surrender the Crown might be enabled to make a further and more particular grant and limitation of the same—the Crown granted the said four acres of land to the said Boulton, Robinson, and Allan, their heirs and assigns, to have and to hold the same upon the following trusts: as

to and for that certain part or parcel of the said four acres described as follows, that is to say : commencing on King Street at the south-west angle of the lot, formerly part of the church reservation, and since granted to the Rev. T. O. Stuart, thence north 16 degrees west, 6 ch., 34 lks, more or less, to Newgate Street, then south 74 degrees west along Newgate street 151 feet, thence south 16 degrees east to King Street, then north 74 degrees east along King Street 151 feet to the place of beginning ; In trust to hold the same for the sole use and benefit of the resident clergyman of the said Town of York and his successors appointed or to be appointed Rector of the Episcopal Church therein, to which the said land is appurtenant, to make leases of the same with the assent of the Incumbent, and to receive the rents due or to grow due therefrom to his use : and as to and for the residue of the said four acres, to hold the same to and for the the sole use and benefit of the parishioners and inhabitants of the said Town of York forever as a church yard and burying ground for the inhabitants of the said town, and as appurtenant to the Church built thereon. Provided, that whenever the Lieutenant-Governor of the Province should erect a parsonage or rectory in the said Town of York and present to such parsonage or rectory an incumbent or minister of the Church of England, who should have been duly ordained according to the rules of the said Church, then and whenever the same should happen the Trustees should convey to such incumbent or minister being so appointed, and his successors forever, as a corporation sole to and for the same uses and upon the same trusts:—that by a patent from the Crown certain other lands in the Town of York, viz : lot B. on the south side of King Street, lots one, two, and three, and the east part of lot four on the north side of Adelaide street, and lots one, two, and three, and the east half of lot four on the south side of Stanley street were granted to the Hon. Wm. D. Powell, Hon. James Baby, and the Hon. John Strachan, upon trust to convey the same in such manner as should thereafter be directed by Order in Council : that by inden-

ire dated 4th of July, 1825, made between the said Powell, Baby, and Strachan, of the one part, and the said Boulton, Robinson, and Allan, of the other part, after reciting the above grant and an Order in Council dated the 2nd of Dec., 1824, requiring the grantors to convey the said lands to the grantees, the grantors, the said Powell, Baby, and Strachan, did grant and convey the lands so to them granted by patent unto the grantees, the said Boulton, Robinson, and Allan, upon trust, nevertheless, that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the Town of York and his successors appointed or to be appointed Incumbent of the parsonage or rectory of the Episcopal Church according to the rites and ceremonies of the Church of England therein to which the said land was appurtenant; and that this indenture contains a proviso for conveyance by the Trustees upon the erection of a parsonage or rectory, and presentation thereto in the same terms as that contained in the letters patent of the 4th of September, 1820: that by an Act of the Legislature of the Province of Upper Canada, passed in the 4th year of the reign of His late Majesty William IV., cap. 23, the Town of York was converted into and incorporated as the City of Toronto: that by letters patent dated the 16th of January, 1836, reciting the Imperial Act passed in the 31st year of the reign of His late Majesty George III. entitled, "An Act to repeal certain parts of an Act passed in the 14th year of His Majesty's reign, intituled An Act for making more effectual provision for the Government of the Province of Quebec in North America, and to make further provision for the Government of the said Province," and reciting that His Majesty having due regard for the spiritual welfare of his loving subjects resident within the Township of York, and being desirous of making a permanent provision for their instruction according to the doctrine and discipline of the Church of England, and also for the support of a Protestant clergyman duly ordained according to the rites of the said Church, had decided to erect and constitute a parsonage or rectory in the City of

Toronto, in the County of York, according to the establishment of the Church of England, to be thereafter known styled, and designated as the first parsonage or Rectory within the Township of York, otherwise known as the parsonage or rectory of St. James—the Crown did set apart lots 6, 9, and 23 in the 2nd concession, and lot 17 in the 3rd concession from the Bay in the said Township of York, containing 800 acres, as a glebe and endowment to be held appurtenant with the said parsonage or rectory that subsequently the Hon. and Rev. John Strachan was duly presented to be Incumbent of the said parsonage or rectory of St. James; and that by deed poll dated the 10th of February, 1841, reciting the letters patent of the 4th of Sept., 1820, the indenture of the 4th of July, 1825, some other documents, and the presentation of the said Hon. and Rev. John Strachan to the parsonage of St. James, the said John Beverley Robinson, William Allan, and John Godfrey Spragge (who had been appointed a new trustee instead of the said D'Arcy Boulton,) granted the said lands directed in the said letters patent of the 4th of September, 1820, and indenture of the 4th of July, 1825, to the said Hon. and Rev. John Strachan, Rector of St. James, and his successors in the said rectory forever, as a corporation sole to and for all the same uses and upon the same trusts as are mentioned and expressed in the said letters patent and indenture.

The plaintiffs also state the presentation on the 16th day of February, 1847, of the Rev. Henry James Grasett to be incumbent of the parsonage or rectory of St. James in the place of the said Hon. and Rev. John Strachan, who had resigned, and that he the said Henry James Grasett was until the time of his death in possession of the lands in question, and in receipt of the rents, issues, and profits of the same for his own use and benefit.

The plaintiffs then refer to the Act of Parliament of the late Province of Canada, 7 Vic., cap. 68, incorporating the Church Society of the Diocese of Toronto, and the Act of the Parliament of Canada, 28 Vic. cap. 54, amending the

same, and also an Act of the Legislature of Ontario, 32 Vic. cap 57, whereby the plaintiffs, the Incorporated Synod of the Diocese of Toronto, was incorporated, and the Church Society of the Diocese of Toronto was united to and incorporated with the said Synod. The plaintiffs also refer to the Act of the Legislature of Ontario, 39 Vic. cap. 109, and the 1st, 2nd, and 3rd sections of the same, and to an Act of the same Legislature, 41 Vic. cap. 69, whereby it was, amongst other things, enacted that the plaintiffs the Synod of Toronto should have in matters relating to or within the Diocese of Toronto like powers and authority as are vested in the Incorporated Synod of Ontario in respect of the said last mentioned Diocese under sections 1, 2, and 3 of the said Act 39 Vic. cap. 109, and that, "No incumbent of any rectory in the Diocese of Toronto who may be inducted therein after the passing of this Act shall receive out of the proceeds of such sales invested as in the said Rectory Act last mentioned a sum larger than will, together with the rents, issues, and profits of the lands of the said Rectory, of which he is incumbent, then remaining unsold, amount to the sums following: that is to say, as to the Rectory of St. James, in the City of Toronto, a sum of \$5,000 a year. As to the Rectories in the towns to the extent of \$2,000 a year, and in other places the sum of \$1,600 a year. Provided that such Incorporated Synod may from time to time by resolution, by-law, or canon alter or vary the aforesaid amounts, but so that the incumbent of the said Rectory of St. James shall not receive less than the said sum of \$5,000 a year; and all and any excess of interest arising from the proceeds of such sales and of the rents, issues, and profits of the lands of such rectory respectively remaining unsold beyond such annual payments aforesaid, shall be apportioned to and divided among the incumbents of the other Churches of the Church of England in the said city, and such other places in which the lands belonging to such rectory are situate, or which to such rectory belong respectively, in such proportions as such Incorporated Synod

shall by resolution, by-law, or canon from time to time order and direct."

The plaintiffs also state that on the 20th day of 1882, the said Rev. H. J. Grasett died: that on the 19th day of August, 1882, the defendant, the Rev. John Philip Dumoulin, was presented to be the Incumbent of the said parsonage or rectory of St. James; and the lands embraced in the said letters patent of the 4th of September, 1820, and in the indenture of the 4th of July, 1825, are leased, and are yielding an annual rent of \$13,293.30.

The plaintiffs also state that after the year 1882, during the lifetime of the said H. J. Grasett, a number of new parishes were from time to time set up and erected by proper authority in the City of Toronto, so that there were at the date of the death of the said H. J. Grasett and are now, besides the parish of St. James, sixteen other parishes in the City of Toronto, each with its Rector, and that the plaintiffs other than the Incumbent of St. James, the Rev. John Philip Dumoulin, the Incumbent of St. James, the Rev. John Philip Dumoulin (and other than the defendants at the trial) are the sixteen Rectors mentioned and referred to in the resolution of the Synod of the 16th day of August, 1882, which is as follows: "That in accordance with a resolution passed at a meeting of the City of Toronto, the Synod hereby distribute the surplus of St. James' Rectory amongst the sixteen Rectors of the City of Toronto, and the five Rectors resident in the Township of York, and the said surplus be not paid over to the Township of York until a legal decision as to the construction of the said resolution be first had, and if such decision be adverse to the Toronto Rectors the said surplus reserved for them be and become the property of the sixteen city clergymen." And the plaintiffs claim that the surplus referred to in the said resolution is the income or revenue derived from the rent of the lands embraced in the said letters patent of the 4th of September, 1820, and the indenture of the 4th of July, 1825, and from the investment of the proceeds of certain portions of the 800 acres mentioned, and the rents of other portions thereof.

The plaintiffs further state that since the induction of the defendant, the Rev. John Philip Dumoulin, as such rector he has been receiving the rents, issues, and profits of said lands embraced in the said letters patent and the said indenture of the 4th of September, 1820, and the 4th of July, 1825, respectively: that there is a large sum in his hands received from these sources, and that he has been applied to on behalf of the plaintiffs to pay over to the plaintiffs the said moneys in his hands in order that the same might be distributed amongst the parties entitled thereto in accordance with the said resolution of the Synod, but that he has hitherto neglected and refused to pay the said sums or any part thereof, and that he is assuming to grant renewals of leases of some of the said lands without consulting the plaintiffs or any of them, and without giving the plaintiffs an opportunity of determining whether the terms upon which such renewals are being granted are beneficial to the plaintiffs or otherwise: that other leases are about falling in, and the defendant Dumoulin intends to do likewise in respect of these.

The plaintiffs charge that by force of the various Acts of Parliament to which they refer, and by reason of the events which have happened, the lands embraced in the said letters patent of the 4th of September, 1820, and the indenture of the 4th of July, 1825, are subject to the operation of the said Acts, and that the defendant Dumoulin holds the said lands upon trust in accordance with the said Acts; but that he refuses to recognize the said trust and claims to hold the said lands and the rents, issues, and profits thereof for his own benefit; and they ask to have it declared that these lands and the revenues thereof are subject to the operation of the various Acts of Parliament to which they refer, and that the defendant Dumoulin is a trustee of the said lands and the revenues thereof and holds the same upon and for the purpose stated by the plaintiffs, and they ask an account from March 25th, 1882. They also ask the appointment of a receiver and for an injunction.

The defendant, the Rev. John Philip Dumoulin, in his statement of defence says that he is the incumbent of the parsonage or rectory of the Church mentioned in the 3rd paragraph of the plaintiff's statement of claim (which is the parsonage or rectory of the Episcopal Church in the Town of York) and that he is the successor of the resident clergyman of the Town of York, mentioned in the paragraph, (who, as I understand the matter, is the resident clergyman mentioned in the indenture of July 4th, 1825, for whose benefit and the benefit of whose successors the lands were by the Government conveyed) and he sets up, amongst other defences, as a defence, that the several Acts of Parliament referred to by the plaintiffs do not affect his rights to the lands mentioned in the 1st, 2nd, and 3rd paragraphs of the plaintiff's statement of claim (which are all the lands mentioned or referred to that lie in the City of Toronto), and says, that notwithstanding any thing in the said Acts contained, his rights as the Incumbent of the said Church parsonage and rectory are the same as if the said Acts had not been passed. This appears to me to be his chief defence to the action. All the conveyances were either proved or admitted, and there was little if any dispute as to the facts of the case which now seem to be material to the determination of the differences between the contending parties.

In this case much seems to depend upon the question as to whether or not the Parliament of the late Province of Canada had power and authority to pass the Act 29-30 Vic., chap. 16, intituled "An Act to provide for the sale of the Rectory lands of this Province." By the first section of this Act it is provided amongst other things as follows: "The Incorporated Synod of any Diocese of the United Church of England and Ireland in Canada, or the Church Society of any Diocese, with the consent of the Synod of such Diocese where such Synod is not incorporated, shall have full power and authority to sell and absolutely dispose of any lands granted by the Crown in such Diocese as a glebe of or as appurtenant to or appro-

priated for any Rectory of the said Church in such Diocese, by whatever name the same may be called, or in whomsoever the title thereto may be vested." On behalf of the defendant the Rev. J. P. Dumoulin it was contended that owing to a restriction contained in the 42nd section of the Imperial Act 31 Geo. III. cap. 31, the Parliament of Canada had no power to legislate upon this subject without observing the formalities contained in that section 42, and it did not appear that these formalities had been observed, and even if this were not so the Act was *ultra vires* according to the law as stated in the case in the Privy Council, *Dobie v. The Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada in Connection with the Church of Scotland*, 7 App. Cas. 136.

The 36th section of the Imperial Act 31 George III, cap. 31, amongst other things, makes provision for the allotment of lands from and out of lands of the Crown within the Province for the support of a Protestant clergy. The 38th section of the same Act provides amongst other things for the erection of parsonages or rectories and the endowment of the same. By the 42nd section it was, amongst other things, enacted, "That wherever any Act or Acts shall be passed by the Legislative Council and Assembly of either of the said Provinces to vary or repeal * * * or to vary or repeal any of the several provisions herein before contained respecting the allotment and appropriation of lands for the support of a Protestant clergy within the said Provinces, or respecting the constituting, erecting, or endowing of parsonages or rectories within the said Provinces, or respecting the presentation of Incumbents or Ministers to the same, or respecting the manner in which such Incumbents or Ministers shall hold and enjoy the same * * * every such Act or Acts shall previous to any Declaration or Signification of the King's assent thereto be laid before both Houses of Parliament in Great Britain, and it shall not be lawful for His Majesty, his heirs or successors, to signify his or their assent to any such Act or Acts until thirty days after the same shall

have been laid before the said Houses, or to assent to any such Act or Acts in case either House of Parliament should within the said thirty days address His Majesty, his heirs or successors, to withhold his or their assent from such Act or Acts; and that no such Act shall be valid or effectual to any of the said purposes within either of the said Provinces, unless the Legislative Council and Assembly of such Province shall in the session in which the same shall have been passed by them have presented to the Governor, Lieutenant-Governor, or person administering the Government of such Province, an address or addresses specifying that such Act contains provisions for some of the said purposes hereinbefore specially described, and desiring that in order to give effect to the same such Act should be transmitted to England without delay for the purpose of being laid before Parliament previous to the signification of His Majesty's assent thereto."

It was contended that this 42nd section was not repealed until the year 1872, when an Act, 35-36 Vic., cap 63, was passed, which is entitled "An Act for further promoting the revision of the statute law by repealing certain enactments which have ceased to be in force or have become unnecessary," which repealed this 42nd section, but contained a provision that the repealing Act should not affect the validity, invalidity, effect, or consequences of any thing then already done or suffered, or any then existing statute or capacity, or any right or title then already accrued, or any remedy or proceeding in respect thereof. The Imperial Act, 3-4 Victoria, cap. 35, entitled, "An Act to re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada," contained a section which was also numbered 42, and which was substantially, if not precisely, the same as section 42 of 31 George III., cap. 31; and the Act 17 & 18 Vic., cap 118, section 6, repealed this 42nd section of the Act 3 & 4 Vic., cap. 35. The repealing section is in these words: "The forty-second section of the said recited Act of Parliament (3-4 Vic., cap. 35) providing that in certain cases bills of the

Legislative Council and Assembly of Canada shall be laid before both Houses of Parliament of the United Kingdom is hereby repealed, and notwithstanding anything in the said Act of Parliament or in any other Act of Parliament contained it shall be lawful for the Governor to declare that he assents in Her Majesty's name to any Bill of the Legislature of Canada or for Her Majesty to assent to any such Bill if reserved for the signification of Her pleasure thereon, although such Bill shall not have been laid before the said Houses of Parliament; and no Act heretofore passed or to be passed by the Legislature of Canada shall be held invalid or ineffectual by reason of the same not having been laid before the said Houses, or by reason of the Legislative Council and Assembly not having presented to the Governor such Address as by the said Act of Parliament is required." It seems clear that this removed any restriction upon legislation upon the subject imposed by the 42nd section of the Act, 31 George III., cap. 31, and that there was not this restriction at the time of the passing of the Act to provide for the sale of the rectory lands, 29 and 30 Vic., cap. 16; and after a perusal of the case *Dobie v. The Temporalities Board*, 7 App. Cas. 136, I am of the opinion that it does not apply to this case as was contended; and I am of opinion that, notwithstanding anything that was urged to the contrary, the Act, 29-30 Vic., cap. 16, was properly passed and is a valid Act.

In respect of this Act it was further contended that the title of the Act and the preamble must be taken to limit the signification of the words in the first section descriptive of the lands authorized to be sold and conveyed, the words "Rectory Lands" in the title and in the preamble being relied upon, and certain alleged copies of Journals of Parliament were tendered as evidence for the purpose, as I understand, of showing what the Legislature must have meant by the words "Rectory Lands." It was not, I think, satisfactorily shown that the originals of which the copies tendered were said to be copies ever existed, nor was it shown by legal evidence that the copies tendered

were copies of any original. I thought, and still think, that the tendered evidence should not—in the face of an objection—be received, considering them simply as alleged copies of documents to be proved in the ordinary manner. It was further urged, however, that as these copies came from the Parliamentary Library at Ottawa they should on that account be received in evidence. Most of the copies purported to have been printed by the Queen's printer, but there is no statute in this country making them receivable in evidence for that reason as there is in England, and I thought, and still think, that their coming from the Library, as stated, was not a sufficient reason for receiving them as evidence in the face of an objection which was pressed to the utmost. No authority was cited by counsel that I thought supported the contention that these copies should be received.

I do not, however, think the matter very material, for even if it were taken as granted that the words "Rectory Lands" had the limited signification mentioned by counsel, that would not make any difference as to the meaning of the words in the 1st section of 29-30 Vic., cap. 16, descriptive of the lands authorized to be sold. In construing the section one is not to look at the preamble if the words of the section are plain, that is, have a plain meaning. But if it were assumed that there is any difficulty in ascertaining the meaning of the words of the section I do not see that this preamble would be of any assistance. In Maxwell on Statutes, 2nd ed., at pp. 56 and 57, it is said: 'It is not unusual to find that the enacting part is not exactly co-extensive with the preamble. In many Acts of Parliament, although a particular mischief is recited, the legislative provisions extend beyond it. The preamble is often no more than a recital of some of the inconveniences, and does not exclude any others for which a remedy is given by the statute. The evil recited is but the motive for legislation. The remedy may both consistently and wisely be extended beyond the cure of that evil, and if on a review of the whole Act a wider intention

than that expressed in the preamble appears to be the real one, effect is to be given to it notwithstanding the less extensive import of the preamble."

And in the same work, p. 50, it is said: "Although the title of a statute is thus recognized and attached to it by Parliament it has long been established by numerous judicial decisions or dicta, from Lord Coke's to the present time, that it is not a part of the statute, and is to be therefore excluded from consideration in construing the statute. 'The title cannot be resorted to,' says Lord Cottenham 'in construing the enactment. The title though it has occasionally been referred to as aiding in the construction of an Act is certainly no part of the law, it is said by the Court of Exchequer in a well known and considered judgment, and in strictness ought not to be taken into consideration at all.' And Lord Denman remarked, that the Court had often laid that down. The rule has not indeed been invariably observed, for the mind when laboring to discover the design of the Legislature, naturally seizes on everything from which aid can be derived. It has even been occasionally asserted that its title was part of a Statute and was not to be disregarded in construing it. But it does not seem that on those occasions attention was directed to the established rule."

It was contended that the lands in question, or some of them at all events, do not fall within the description of lands in this first section of 29-30 Vic. cap. 16.

As to the 800 acres of land in the Township of York, I think there is not room for contention. These are mentioned in the document of the 16th of January, 1836, erecting and constituting the parsonage or rectory of St. James as a glebe and endowment to be held appurtenant with the said parsonage or rectory, and it was conceded that this document had been, in the case *Attorney-General v. Grasett*, 5 Gr. 412, held to be a grant.

Then as to the easterly 151 feet of the four acres east of Church Street and north of King Street, less the part of it occupied as a parsonage, this being the only part of the four

acres contended for by the plaintiffs, the remainder falling under the description in 29-30 Vic., cap. 17, substituting a section 6 for section 6 of the preceding cap. 16, the substituted section being in these words: "This Act shall not apply to any lands granted by the Crown as sites for churches, parsonages, or burial grounds, or now occupied as such," it was shown by the testimony of Col. Grasett that the land occupied by the parsonage now was occupied in the same way at the time of the passing of the last mentioned Act, and that it has in the meantime been continually so occupied. This easterly 151 feet was granted to trustees to hold the same for the sole use and benefit of the resident clergyman of the Town of York and his successors, appointed or to be appointed Rectors of the Episcopal Church therein, to which the said land is appurtenant, &c., and in this grant is contained a proviso that whenever the Governor, Lieutenant Governor, or person administering the Government, should erect a parsonage or rectory in the said Town of York and present to such parsonage or rectory an Incumbent or Minister of the Church of England, &c. &c., the trustees should transfer and convey the land with the appurtenances to such Incumbent or Minister as a sole corporation to and for the same uses and upon the same trusts, &c. All these things precedent happened, and a conveyance was duly made and executed by the trustees in accordance with the provision contained in the grant from the Crown to them. This conveyance was made in 1841, and before the passing of the Act 29-30 Vic., cap. 16, and I think these lands are within the meaning of the description in section 1 of that Act.

As to the lands embraced in the patent of the 26th of April, 1819, these were, with other lands, granted to other trustees upon trust to convey the same in such manner as should thereafter be directed by Order in Council. By an Order in Council bearing date the 2nd day of December, 1824, these trustees were directed to convey the lands to the trustees to whom the grant of the 4th of September was made *for the use of the Church and of the clergyman*

Incumbent therein for the time being. This order is not produced, and it appears only by a recital of it in the conveyance of the 4th of July, 1825, which recital, however, is taken to be proved under the provisions of the Act commonly known as "The Vendors and Purchasers Act," R. S. O. ch. 109. It may be that the whole of the Order in Council is not recited. It is not, however, shown in any way that this order contained any provision respecting a conveyance of the lands to the Incumbent whenever the parsonage or rectory should be erected, but the conveyance by which these trustees transferred the lands to the other trustees contains this provision, and it was contended that this should not have been inserted, inasmuch as it was not shown to have been authorized by the Order in Council.

It is to be observed, however, that this provision was contained in the grant from the Crown to the trustees to whom the conveyance was made by direction contained in this order. There is also the fact that the same trustees were selected, and that the direction was to convey to the use of *the Church*, adding, and of the resident clergyman Incumbent thereof for the time being; and the further facts that no objection seems to have been made to any of the conveyances for so long a period of time, and that the lands have been enjoyed for this long period in the same way as the lands that were embraced in the grant made directly from the Crown to the same trustees, without objection on the part of any one so far as is known. These lands were embraced in the conveyance of the 18th Februry, 1841, to the Rector of St. James, and I think that under all the circumstances I should hold against the contention of the defendant, the Rev. Canon Dumoulin, that the conveyance of these lands to the Rector of St. James was unauthorized and void.

I am of the opinion that these lands are within the description contained in section one of the Act 29-30 Vic., cap. 16, and I think the sale of all the lands now the subject of contention is authorized by the Act.

It was contended that the plaintiffs other than the

Synod, and the defendants other than the defendant Canon Dumoulin were not shewn to be rectors, and that they could not for that reason be recipients of distributive parts under the provisions of section 2 of the Act of Ontario 41 Vic., cap. 69. The language used in that section is "Incumbents of the other churches of the Church of England in the said city and such other places in which the lands belonging to such rectory are situate or which to such rectory belong respectively." As pointed out by Mr. Moss the words "rector or other incumbent" are used in section 16 of 3 Vic. cap. 74, and in section 17 the word "incumbent" is used. It is not I think too much to assume that the Legislature fully understood the language that they employed in this section 2, and that they used the word "incumbent" in the same sense as that in which it had been before used by the Legislature.

The plaintiffs, in giving evidence for the purpose, at the time, of showing induction of the plaintiffs other than the Synod and of the defendants other than the defendant Canon Dumoulin, gave, I think, abundant evidence to show that these sixteen clergymen were incumbents of churches of the Church of England in the City of Toronto within the meaning of the language used by the Legislature in section 2 of the Act. The position of the five defendants added at the trial was not in this respect in dispute.

I am of the opinion that the plaintiffs are entitled to the *declaration* and the *account* that they ask. It was said, however, by their counsel at the trial, that an account would not be necessary. I apprehend that an injunction or a receiver will also be unnecessary. If they are, the matter can be spoken to on settling the judgment. Counsel at the trial said that it was not necessary that I should determine any question between the plaintiffs and the defendants other than the defendant the Rev. Canon Dumoulin.

Before determining the matter of the costs of the litigation I am willing to hear on that subject one counsel for the plaintiffs and one for the defendant the Rev. Canon Dumoulin.

After having heard counsel upon the question of costs, His Lordship pronounced the following judgment :

The matter of the costs of the suit was argued by counsel for the plaintiffs, the defendant Canon Dumoulin, and for the defendants other than this defendant, and, after examining the authorities to which I was referred, and considering the matter as well as I am able, I am of the opinion that the defendant Canon Dumoulin should pay the plaintiffs' costs and the costs of the defendants other than himself (this does not, of course, include the costs of the postponement that the plaintiffs have already been ordered to pay to the defendant Canon Dumoulin). The judgment is with costs as above.

A. H. F. L.

This decision was afterwards affirmed on appeal to the Divisional Court, *vide infra*.

(QUEEN'S BENCH DIVISION.)

REGINA V. CHRISTOPHER BUNTING, JOHN A. WILKINSON,
EDWARD MEEK, AND FRANK S. KIRKLAND.*Criminal law—Conspiracy to bribe members of Parliament—Pleading.*

On demurrer to an indictment (set out below) for conspiracy to bring about a change in the Government of the Province of Ontario, by bribing members of the Legislature to vote against the Government, *Held*, O'CONNOR, J., dissenting.

1. That an indictable offence was disclosed : that a conspiracy to bribe members of Parliament is a misdemeanour at common law, and as such indictable.
2. That the jurisdiction given to the Legislature by R. S. O. ch. 12, sec. 45, 46, 47, 48, to punish as for a contempt, does not oust the jurisdiction the Courts where the offence is of a criminal character, but that the same Act may be in one aspect a contempt of the Legislature, and in another aspect a misdemeanour.
3. That the Legislative Assembly has no criminal jurisdiction, and hence no jurisdiction over the matter considered as a criminal offence.
4. That the indictment, considered as a pleading, sufficiently stated the offence intended to be charged.

Per O'CONNOR, J.—1. That the bribery of a member of Parliament, is a matter concerning Parliament or Parliamentary business, is not an indictable offence at common law, and has not been made so by any statute. 2. That in all matters and offences done in contravention of the law and constitution of Parliament, with the exception of treason, felony, and breaches of the peace, Parliament alone has jurisdiction, and the ordinary Courts, civil and criminal, have no jurisdiction. 3. That the *lex et consuetudo Parliamenti* reserves to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members, and its business, with the above three exceptions.

CONSPIRACY.

The charge was laid by information before the Police Magistrate of the city of Toronto.

The first count or charge of the information was, that the defendants did conspire, &c., to corrupt, deprave, impair, alter, and frustrate the constitutional procedure and action of the Legislative Assembly of the Province of Ontario and the members thereof, in their votes and proceedings therein, at and during the first session of the fifth Legislature of Ontario, held in the city of Toronto, by bribing members of the said Legislative Assembly to vote in opposition to the existing administration of the Executive Government of the Province of Ontario, and th

members of the said Legislative Assembly supporting such government, upon questions arising and to arise in such assembly during the said session.

The count or charge then proceeded to allege that the defendant *Bunting*, in pursuance of the said conspiracy, did certain acts, charged as bribery, to influence Robert McKim and James F. Dowling in their proceedings as members of the said Legislative Assembly; that is to say, that they the said Robert McKim and James F. Dowling should vote in opposition to the existing administration of the Executive Government of the Province of Ontario, and to their supporters, members of the said Legislative Assembly, during the said session as aforesaid; and that *Wilkinson*, in pursuance of the said conspiracy, did certain acts, charged as bribery, to influence Robert McKim, James F. Dowling, W. Balfour, and Robert A. Lyon in their proceedings as members, &c.; and that *Meek*, in pursuance of the said conspiracy, did certain acts, charged as bribery, to influence Robert McKim and Robert A. Lyon in their proceedings as members, &c.; and that *Kirkland*, in pursuance of the said conspiracy, did certain acts, charged as bribery, to influence Robert McKim, James F. Dowling, and other members of the said Assembly in their proceedings as members, &c.

The second count or charge of the information stated the conspiracy to be to subvert, change, alter, defeat, and overthrow the then existing administration of the Executive Government of the Province of Ontario, by bribing members of the Legislative Assembly of the said Province to vote in opposition to the members of the said Executive Government and their supporters, members of the said Legislative Assembly, upon questions arising and to arise in the said Assembly during the first session of the fifth Legislature of Ontario. It was then alleged that Bunting, in pursuance of the said conspiracy, did the acts charged in the first count as then and there alleged, and to the intent then and there stated; and the like as to Wilkinson, Meek, and Kirkland.

The third count or charge was, that the defendants conspired to bribe Robert McKim, a member of the Legislative Assembly, to influence him in his proceedings as such member.

The fourth count or charge was, that the defendants conspired to bribe James F. Dowling.

The fifth count or charge was, that the defendants conspired to bribe W. D. Balfour, &c., to influence him, &c.

The sixth count or charge was, that the defendants conspired to bribe Robert A. Lyon, a member, &c., to influence him, &c.

The charges were very fully enquired into, and the case was argued for the respective defendants by counsel before the Police Court; and the Police Magistrate, after a careful and well considered judgment, bound the parties respectively by recognizance to appear to answer an indictment to be preferred against them at the ensuing Assizes to be held for the county of York.

At the Spring Assizes held at Toronto, before Hagarty, C. J., the indictment was found by the grand jury.

The indictment was as follows:—

The jurors for our lady the Queen, upon their oath, present that heretofore, to-wit, on the twenty-second day of January, in the year of our Lord one thousand eight hundred and eighty-four, certain persons filling the offices of Attorney-General of the Province of Ontario, Secretary and Registrar of the said Province, Commissioner of Crown Lands of the said Province, Commissioner of Public Works of the said Province, Treasurer and Commissioner of Agriculture of the said Province, and Minister of Education of the said Province, constituted the Executive Council of the said Province of Ontario, in pursuance of chapter fourteen of the Revised Statutes of the said Province, and the "British North America Act, 1867:" that each of the said persons was a member of the Legislative Assembly of the said Province: that by constitutional law and usage it was necessary that the said persons should possess the support and confidence of a majority of the members of the said Legislative Assembly, in order to their continuance in office as such Executive Councillors as aforesaid.

That on the day and year aforesaid, in the City of Toronto, in the county aforesaid, Christopher W. Bunting, John A. Wilkinson, Edward Meek, and Frank S. Kirkland, together with divers other persons whose names to the jurors aforesaid are unknown, did amongst themselves unlawfully conspire, combine, confederate and agree together, corruptly

and illegally to influence and procure certain members of the Legislative Assembly of the said Province, to wit : John Cascaden, Robert McKim, Robert A. Lyon, William D. Balfour, John F. Dowling, and other members of the said Legislative Assembly whose names are to the jurors aforesaid unknown, to vote in favour of a certain resolution to be introduced into the said Legislative Assembly by certain members of the said Legislative Assembly whose names are to the jurors aforesaid unknown, which should declare that the said members of the said Executive Council did not possess the support and confidence of the majority of the members of the said Legislative Assembly, by the payment to the said members of the said Legislative Assembly so proposed to be influenced as aforesaid of certain bribes, to wit, the payment of certain sums of money, and the promise of the procurement for them of their appointment to certain offices of emolument under Her Majesty in the gift of the Government of Canada, and divers other valuable considerations to the jurors unknown, to the intent that His Honour the Lieutenant-Governor of the said Province might thereby be induced to dismiss the said members of the said Executive Council and appoint other persons to the jurors aforesaid unknown to be members of the said Executive Council in the room of the members so to be dismissed as aforesaid ; in contempt of our Lady the Queen and of the laws and government of the said Province, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

2. And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to-wit on the day and year aforesaid, certain persons filling the offices of Attorney-General of the Province of Ontario, Secretary and Registrar of the said Province, Commissioner of Crown Lands of the said Province, Commissioner of Public Works of the said Province, Treasurer and Commissioner of Agriculture of the said Province, and Minister of Education of the said Province, constituted the Executive Council of the said Province of Ontario in pursuance of Chapter 14 of the Revised Statutes of the said Province of Ontario, and the British North America Act, 1867 : that each of the said persons was a member of the Legislative Assembly of the said Province of Ontario : that by constitutional law and usage it was the duty of the members of the Executive Council of the said Province to advise His Honour the Lieutenant-Governor amongst other things as to the appropriation and tax bills, the recommendation of money votes, the assent to bills to be passed by the Legislative Assembly : that in order to the continuance in office of the members of the said Executive Council it was necessary that a majority of the members of the said Legislative Assembly should so far agree with the advice which the said members of the said Executive Council from time to time should give to His Honour the Lieutenant-Governor of the Province upon the matters aforesaid, that they should be willing to support the bills and resolutions introduced into the Legislative Assembly in support of the said matters, in respect of which the said Executive Council had advised His Honour as aforesaid : that on the day and year aforesaid, at the city of Toronto, in the county aforesaid,

Christopher W. Bunting, John A. Wilkinson, Edward Meek, S. Kirkland, together with divers other persons whose names the jurors aforesaid are unknown, did amongst themselves conspire, combine, confederate, and agree together, corruptly to influence and procure certain members of the Assembly of the said Province, to-wit: John Cascaden, Robert A. Lyon, William D. Balfour, John F. Dowling, members of the said Legislative Assembly, whose names are to the jurors aforesaid unknown, to vote against certain of the bills and resolutions which should be introduced to enact in bills recommended by His Honour the Lieutenant-Governor, and by the said Legislative Assembly in pursuance of the advice given by the members of the said Executive Council as to the matters aforesaid, in order that the said bills and resolutions might be defeated, by the jurors aforesaid, to the said members so sought to be corruptly influenced as to certain bribes, to-wit, the payment of certain sums of money, the promise of the procurement for them of their appointment to offices of emolument under Her Majesty in the Government of the Province, and divers other valuable considerations to the jurors unknown, with intent that the said members of the said Executive Council might be dismissed and other persons appointed in their room and stead, to the detriment of our said Lady the Queen, and of the laws and government of the Province, to the evil example of all others in the like case offered, and against the peace of our Lady the Queen, her crown and dignity.

3. And the jurors aforesaid, upon their oath aforesaid, do confess and sent that heretofore, to wit, on the day and year aforesaid, Christopher W. Bunting, John A. Wilkinson, Edward Meek, S. Kirkland, together with divers other persons whose names to the jurors aforesaid are unknown, did amongst themselves unlawfully conspire, combine, confederate, and agree together, corruptly and illegally to influence and procure certain members of the Legislative Assembly of the Province—to wit, John Cascaden, Robert McKim, Robert A. Lyon, William D. Balfour, John F. Dowling, and other members of the said Legislative Assembly whose names are to the jurors aforesaid unknown, to vote in favour of certain resolutions to be introduced into the said Legislative Assembly affecting the law of the Province touching the management of the timbered lands of the Province, to wit, resolutions declaring to be the opinion of the said Legislative Assembly that the timber on lands granted by the Crown, in pursuance of the twelfth chapter twenty-nine of the Revised Statutes of Ontario, and that the timber was thereby reserved to the Crown, should be sold to the Crown, his heirs or assigns, upon certain terms in the said Statutes, to the jurors aforesaid unknown, by the payment to the said members of the said Legislative Assembly, so proposed to be influenced, as to certain bribes, to wit, the payment of certain sums of money, the promise of the procurement for them of their appointment to offices of emolument under Her Majesty in the Government of the Province, and divers other valuable considerations to the jurors unknown,

intent that the management of the timbered lands of the Province should be changed, and that the said twelfth section of the said chapter twenty-nine of the Revised Statutes of Ontario should be repealed by an Act of the Legislature of Ontario, in contempt of our said Lady the Queen, and of the laws and government of the said Province ; to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her crown and dignity.

The defendants, at the Assizes, moved to quash the indictment, because the third count was not respecting a charge which was contained in the information before the Police Magistrate, and it was not allowable to add it either by the 32-33 Vic. ch. 29, sec. 28, or by the amendment of it, 40 Vic. ch. 26, sec. 1.

It was discussed at length before the learned Chief Justice, who, it appeared from the shorthand notes, overruled the motion, and the defendants then demurred to the indictment, and the Crown joined in the demurrer.

A discussion then took place as to the argument of the demurrer, and the result was, that the Crown agreed to apply for a writ of *certiorari* to remove the proceedings into this Court upon the defendants extending their recognizances. The recognizances were extended, and the writ of *certiorari* issued, and the cause and the proceedings were thereupon duly removed.

When the proceedings came into this Court the counsel for the Crown set down the demurrer for argument, and took out a *concilium* to argue it.

The defendants moved to set aside the entry of the demurrer for argument and the *concilium* taken out, contending that the defendants must be called upon to appear and plead to the indictment again in this Court, and that they had not been called upon to appear, nor had they appeared or pleaded here. The rule of the defendants for that purpose was discharged, the majority of the Court being of opinion the proceedings were removed into this Court in the same state in which they were in the Court below when the writ of *certiorari* issued : see *Regina v. Bunting*, 7 O. R. 118.

The defendants also contended they had not admitted that the learned Chief Justice had, at the Assizes, refused to quash the indictment, while the counsel for the Crown asserted the motion to quash had been overruled.

The Court allowed the defendants, therefore, to make the motion to quash, and to consider the record for that purpose as if it had not been demurred to, if the demurrer should be any impediment in the way, so that judgment might be given for or against the motion as if such demurrer had not been put in.

December 3, 1884. *W. A. Foster* obtained a rule calling upon the Attorney-General to shew cause why the indictment preferred and now in this Court or the third count thereof, should not be quashed, on the following grounds:

1. That the prosecutor of the indictment had not been bound by recognizance to prosecute or give evidence against the accused of the offence or offences charged: that the persons accused had not been committed to or detained in custody, or bound by recognizance to appear to answer to an indictment to be preferred against them for the offence or offences charged in the indictment: that the indictment was not preferred by direction of the Attorney-General of this Province nor by a Judge of a Court having jurisdiction to give such direction, or to try the offence or offences charged in the indictment, and was not presented to the grand jury with the consent of the Court in or before which the same was preferred; and that the indictment did not contain a count or counts founded upon facts or evidence disclosed in any examination or depositions taken before any Justice of the Peace in the presence of the persons accused of the offence or offences charged in the indictment, and transmitted or delivered to such Court in due course of law.

2. That the indictment was found without any jurisdiction in the Grand Jury to find the same.

3. That the facts stated in the indictment did not amount to an offence in law.

4. That the allegations in the indictment were too vague, general, and indefinite.

5. That the defendants were charged with separate and distinct offences in the different counts of the indictment.

6. That the offences charged were offences against the Legislature and Legislative Assembly of the Province, and the said Legislature and Legislative Assembly had conferred upon them under and by virtue of the R. S. O. chs. 12 and 17, and the 47 Vict. ch. 4, sec. 46, full jurisdiction and authority to enquire into such offences as were charged in the indictment, and to prosecute and punish those found guilty of the same; and that the said Legislative Assembly had, by and through its committee of privileges and elections, and by royal commission, instituted and prosecuted proceedings for enquiring into the said alleged offences, and for the trial and punishment of the persons named in the said indictment as defendants for the offences alleged in the said indictment; and that the said prosecution was now pending; and that it was contrary to the law and dignity of Parliament for the said offences to be prosecuted before the ordinary Criminal Courts when the Legislative Assembly had chosen to deal with the same.

7. That it was manifestly unjust, and contrary to the law and practice in criminal cases, that the accused should be prosecuted before two distinct tribunals simultaneously for the same offence.

8. And also upon the further and other grounds disclosed in the affidavits, depositions, proceedings, and papers brought into this Court on the return and amended return to the writ of *certiorari* issued herein, and in the affidavit of Edward Meek, on moving this rule, and the papers and exhibits therein referred to.

At the same sittings, *S. Richards*, Q. C., for Wilkinson, *Foster*, for Bunting, *Murdock*, for Wilkinson, and *Meek*, in person, argued the rule and demurrer.

It is not said the four members of the Legislative Assembly who were to be influenced to vote in favour of the resolution to be introduced into the Legislative Assem-

bly were to be influenced to vote *as* members of the Legislature in favour of the resolution. The influence might be to procure them to vote in some committee or at some party meeting in favour of the resolution, and not necessarily in the House of Assembly as members of it.

It does not shew for what purpose money was to be paid, or for what purpose the office was to be secured, or by whom the money was to be paid, or by whom the promise of office was to be made, or was made.

It is not shewn the payment of money or the promise of an office was for a corrupt purpose.

It does not appear the persons sought to be corrupted were to be corrupted *as* members of the Legislative Assembly.

The character of the resolution should have been more specifically set out.

The ordinary Courts of the Province or of the Dominion have no jurisdiction in a case of this kind.

The offence is within the sole jurisdiction of, and can be competently dealt with by, the Legislative Assembly, because it is a breach of the law and custom of Parliament.

It was also objected, by way of motion to quash the indictment, that it was not for the like offences with which the defendants were charged before the Police Magistrate, and that it could not be maintained even although the defendants had been bound by recognizance to appear to an indictment to be preferred against them—32-33 Vic. ch. 29, sec. 28; and that the third count at any rate should be quashed, because it did not charge any offence which was made before the Police Magistrate, and the Court before which the indictment was preferred did not give any opinion that the third count was founded upon the facts disclosed in any examination or deposition taken before the Police Magistrate, though taken in the presence of the accused, and transmitted to the Court in the due course of law: 40 Vic. ch. 26, sec. 1.

Richards, Q.C., cited the following authorities: *The Queen v. Peck*, 9 A. & E. 686; *Rex v. Richardson*, 1 M. & Rob.

402 ; *The Queen v. O'Connell*, 11 Cl. & F. 155 ; *The Queen v. Parker*, 3 Q. B. 292 ; *The Queen v. King*, 7 Q. B. 782 ; *Burdett v. Abbott*, 14 East 1 ; *Stockdale v. Hansard*, 9 A. & E. 1 ; *Gossett v. Howard*, 10 Q. B. 359-411 ; *Bradlaugh v. Gossett*, 12 Q. B. Div. 271 ; *Ex parte Wason*, L. R. 4 Q. B. 573 ; *Stockdale v. Hansard*, 11 A. & E. 253-297 ; *May's Law and Usage of Parliament*, 8th ed., 74-102 ; *McNab v. Bidwell*, Draper's R. 152 ; *The Queen v. Gamble*, 9 U. C. R. 546 ; *Henderson v. Dickson*, 19 U. C. R. 592 ; *Beaumont v. Barrett* 1 Moore's P. C. 59 ; *Kielley v. Carson*, 4 Moore's P. C. 63 ; *Fenton v. Hampton*, 11 Moore P. C. 347 ; *Doyle v. Falkiner*, 4 Moore P. C. N. S. 203 ; *Dill v. Murphy*, 1 Moore P. C. N. S. 487 ; *The Speaker of Legislative Assembly of Victoria v. Glass*, L. R. 3 P. C. 560 ; *Valin v. Langlois*, 3 S. C. 1 ; B. N. A. Act, sec. 92, sub-sec. 1, as to Ontario having power to amend its constitution ; R. S. O. ch. 12, sec. 45 and subsecs. to sec 52, inclusive, R. S. O. ch. 17 ; 44 Vic. ch. 4, sec. 46, and sub-sections.

Foster cited the following authorities on the right of the Legislative Assembly to exercise exclusive jurisdiction over this case: 33 Vic. ch. 5 of the Province of Quebec : *Ex parte Danserau*, 19 Lower Canada Jurist, 210 ; Acts of 1876, ch. 22 of Province of Nova Scotia, substantially like the Act of Quebec ; Act of Manitoba, 1876, ch. 12. In 1680 the House of Commons exercised its jurisdiction in a case of conspiracy to oppose a resolution in Parliament. See in the Index of Cases in the Parliamentary Library at Ottawa *John Ashburnham's Case*, receiving a bribe, 19 Car. 2 ; *Vernon's Case*, 7 Geo. I., taking a bribe ; *FitzHarris's Case*, Trials 223 ; *Bourinot's Parliamentary Practice* and 8 State Procedure, 1884, p. 196. And as to what was bribery, 1 *Russ. on Crimes*, 5th ed., 318 ; 4 Bl. Com. 128 ; 2 Inst. 145 ; 1 *Hawk.*, P. C. 414 ; *Roscoe on Criminal Evidence*, 8th ed., 331.

Murdock referred to 32-33 Vic. ch. 29, secs. 70-71, D. [ARMOUR, J., referred to sec. 28, and to *The Queen v. County of Carleton*, 1 O. R. 277.]

Meek referred to 32-33 Vic. ch. 29, sec. 28 D., and 40 Vic. ch. 26, sec. 1, D., as not applicable. The Imperial Acts 23 Vic. ch. 17, secs. 1, 2, and 30-31 Vic. ch. 35, sec. 1, are different. The individual consent of the Attorney-General is required to warrant such an indictment as this being preferred: *Abrahams v. The Queen*, 6 S. C. 10. If binding the defendants over to appear enabled the indictment to be preferred, the counts are not the same as those which were before the Police Court. The proceedings taken by the Legislative Assembly are published in the Journals of the Assembly for 1884, pp. 150, 154, 198, and Appendix No. 2, and also the Commission issued to Proudfoot, J., and two of the County Court Judges to enquire into the charges in question and to report thereon. See *Rex v. Ashburn*, 8 C. & P. 50; *Regina v. Ingham*, 14 Q. B. 396; *Arch. on Criminal Evidence*, 1878, pp. 97 to 99.

Irving, Q. C., for the Crown. As to quashing the indictment the case is clearly within 32-33 Vic. ch. 29, sec. 28, D., as to one or two of the counts, if not as to all, and if one or two of the counts is or are within it, then by the 40 Vic. ch. 26, sec. 1, D., the other count or counts may be added. The evidence before the Police Magistrate warrants such further count or counts being added. This objection was taken before the Chief Justice at the Assizes. See *The Queen v. Bray*, 3 B. & S. 255; *The Queen v. Heane*, 4 B. & S. 947. The Court may quash the indictment after plea: *Knowlden v. The Queen*, 5 B. & S. 532-550; *Ex parte Wason*, L. R. 4 Q. B. 573; *The Queen v. Bell*, 12 Cox C. C. 37; *The Queen v. Burton*, 13 Cox C. C. 71; *The Queen v. Bradlaugh*, 15 Cox C. C. 156; *The Queen v. Yates*, 15 Cox C. C. 272; *The Queen v. Broad*, 14 C. P. 168. An indictment will not be quashed if there is not a substantial difference between the information and indictment: *Abrahams v. The Queen*, 6 S. C. 10. As to the right of the Court to entertain this case: *The King v. Johnson*, 6 East 583; *The Queen v. Stockley*, 3 Q. B. 238; *FitzHarris' Case*, 8 St. Tr. 223, 243, 326, 430. It is sufficiently allego

the parties to be bribed were to vote as members of the Legislative Assembly. As to the mode of corruption, the objection is, that the indictment is too general. See *The Queen v. Peck*, 9 A. & E. 686; 2 *Stephen's Hist. C. L.* p. 229; *O'Connell v. The Queen*, 11 Cl. & F. 233, 235; *The Queen v. Bunn*, 12 Cox C. C. 316; *The Queen v. Parnell*, 14 Cox C. C. pp. 510, 512, 514, 515, 519.

This is bribery at common law: *The King v. Pitt*, 1 W. Bl. 380; *Vaughan's Case*, 4 Burr. 2494; *Plympton's Case*, 2 Ld. Raym. 1377; *The People v. Sessions*, 62 Howard's Pr. R. 415. *Wharton's Precedents of Indictments*, vol. ii. p. 1012, is important, because the precedent there was in a case of attempting corruptly to induce by bribery a member of the Legislature of Pennsylvania to aid in procuring the re-charter of a particular bank. The charge was made as a common law offence: *Walsh v. The People of Illinois*, 65 Ill. 58; *The State v. Pearce*, 14 Florida 153. The prosecution in that case appears to have been under an Act of the State: "An Act to provide for the punishment of crime and proceedings in criminal cases," ch. 6, sec. 7: *The State v. Ellis*, 33 New Jersey L. R. 102.

Richards, Q. C., in reply, cited *Wright v. The Queen*, 14 Q. B. 148; *Rex v. Seward*, 1 A. & E. 706; *Sir John Eliot's Case*, 3 St. Tr. 290, cited in *Bradlaugh v. Gossett*, 12 Q. B. D. 271.

Foster referred to 1 *May's Const. Hist.* ch. 6; *Hallam's Const. Hist.*, treating of *Bribery*.

Meek referred to 2 *May's Const. Hist.*, 74 to 83; *The Queen v. Heywood*, 33 L. J. Mag. Cas., 133, as to quashing indictment.

Irving, Q.C., cited further *Regina v. Titley*, 14 Cox, C. C. 502; *Rex v. Gregory*, 4 T. R. 240, note; *Regina v. Aspinall*, 1 Q. B. Div. 730, 2 Q. B. Div. 48. As to sufficiency of averments, *Sydserrff v. The Queen*, 11 Q. B. 245; 1 *Chitty's Cr. Law*, 52; *Attorney-General of N. S. Wales v. Macpherson*, L. R. 3 P. C. 268.

ARMOUR, J., referred to *The People ex rel. Macdonald v. eeler*, 29 Albany Law Journal 511.

February 9, 1885. WILSON, C. J.—The order of with the exceptions which have been taken to the proceedings will be to determine first, whether the conspiracy in which a member is either a party or actor, is or is not an offence cognizable by this Court.

The defendants allege that such an act is within the exclusive jurisdiction of the Legislature whose members have been attempted to be corrupted, because that bribery by the common law is confined to the cases in which it is practised or attempted to be practised upon persons and in proceedings connected with the administration of justice, and as this is not a case of that kind this Court has no jurisdiction over it. In the second place, that as the persons who were attempted to be corrupted were members of the Legislative Assembly the Criminal Courts have no jurisdiction, but the jurisdiction to deal with such a case rests with the Legislative Assembly according to the law and custom of Parliament.

This charge, however, is not a charge of bribery or an attempt to bribe. It is for a conspiracy by means of bribery to do an improper act.

But even if it were for bribery or an attempt to bribe members of the Legislature, it is still a common law offence; and although the Legislative Assembly has power to punish all parties concerned in any offence committed against the rights and privileges of the Legislature, such power is independent of, and in no way in derogation of the general law of the land, which stands free from the Legislature independent of all the usages and law of Parliament, custom and law of Parliament having no other effect than that they are a part of that general law.

The powers and privileges of Parliament, when exercised, are not to be questioned by any Court or tribunal, but whether they are duly exercised is a matter to be determined by the general law of the land, the Courts and tribunals taking notice of the law of Parliament as they take notice of the common law, the civil law, or of any foreign law whenever they are called upon to do so.

Conspiracy to bribe is undoubtedly a common law offence, and the offence of bribery of, or the attempt to bribe a member of Parliament is a common law offence.

The contention, then, in reality is, that the Legislative Assembly has the exclusive right to entertain and to try a criminal offence whenever that offence involves or touches any of its privileges, or, in other words, that the Legislative Assembly is a Criminal Court in all such cases. There is no legal authority produced or producible for such a claim, and consider to what extent it may be carried.

The Assembly directs the Speaker to issue his warrant to bring up a contumacious witness, or to arrest some one who has assaulted a member of the Assembly within the precincts of the house, or to take into custody a member of the house for unruly conduct in the face of the House; the person resists the sergeant-at-arms in executing or in attempting to execute the warrant, and in his resistance he is killed by the officer; is the Legislative Assembly to try the officer for the death of the person he was directed to arrest, because his death happened in executing or in attempting to execute the warrant of the Speaker? Or if the person to be arrested take the life of the sergeant-at-arms, is that person to be tried for the life he has taken, because his resistance to the warrant is a contempt of the house? Or if in the heat of debate one member strike or shoot another member in the house who has used insulting or unparliamentary language to him, is the Legislative Assembly to sit in judgment upon the offender? And if they do, and convict him, what are they to do with him?

These are extreme cases; but where is the limit if the House is to declare its own privileges without question? For extreme cases may fairly be put to oppose extreme pretensions, or I should say extreme arguments, for the Legislative Assembly makes no such pretensions.

In *Hallam's Constitutional History*, 10th ed., vol. iii. 284 to 286, the uncontrollable privilege of either House of Parliament is described as,

“Eminently dangerous in a free country, and repugnant to the analogy of our constitution. * * If the resolutions of the Lords in the business of *Ashby* and *White* are constitutional and true, neither House of Parliament can create to itself any new privilege—a proposition surely so consonant to the rules of English law, which require prescription or statute as the basis for every right, that few will dispute it; and it must be still less lawful to exercise a jurisdiction over misdemeanors by committing a party who would regularly be only held to bail on such a charge.”

And after referring to the bad precedents of the House of Lords, he adds: “If the matter is to rest upon precedent, or upon what overrides precedent itself, the absolute failure of jurisdiction in the ordinary Courts, there seems nothing (decency and discretion excepted) to prevent their repeating the sentences of James I.’s reign—whipping, branding, hard labour for life; nay, they might order the Usher of the Black Rod to take a man from their bar and hang him up in the lobby.”

The Courts have truckled too much to the assumed privileges of Parliament; but the cases of *Ashby v. White* 9 A. & E. 1, and *Stockdale v. Hansard*, I. Sm. L. C., 8th ed., 264, have stripped the law of Parliament of all mystery, and have brought it, as part of the general law, within the judgment of the legal Courts of the country.

I may say the privileges of the House of Assembly have fallen strangely within the care of the defendants, who are advocating the rights of that body, whose laws they are said to have broken, and who, it is suggested, are also their prosecutors.

The Acts which the defendants have referred to were R. S. O. ch. 12, secs. 45 *et seq.* and ch. 17, and the 47 Vic. ch. 4, sec. 46, O. to establish the exclusive jurisdiction of the Legislative Assembly, but that body is directly opposed to any such right. The Legislature assumes by these Acts to deal in a particular manner and by a limited punishment with the matters therein provided for, and it disclaims anything like the assumption of criminal jurisdiction.

R. S. O., ch. 12, sec. 45, and subsec. 3, and the conclusion of that section, following after subsec. 11, enact

Section 45: "The said Assembly shall have all the rights and privileges of a Court of Record for the purpose of summarily enquiring into and punishing as breaches of privilege, or as contempt of Court (without prejudice to the liability of the offenders to prosecution and punishment, criminally or otherwise, according to law, independently of this Act), the acts, matters, and things following."

Subsec. 3. "The offering to or the acceptance of a bribe by any member of said Assembly to influence him in his proceedings as such, or the offering to or acceptance of any fee, compensation, or reward by any such member for or in respect of the drafting, advising upon, revising, promoting or opposing any bill, resolution, matter or thing submitted to or intended to be submitted to the said Assembly, or any committee thereof."

"And for the purpose of this Act, the said Assembly is hereby declared to possess all such powers and jurisdiction as may be necessary or expedient for enquiring into, judging and pronouncing upon the commission or doing of any such acts, matters, or things, and awarding and carrying into execution the punishment thereof provided for by this Act."

Section 46 enacts that "Every person who, upon any such enquiry, appears to have committed or done any of the acts, matters, or things in the section 45 mentioned, in addition to any other penalty or punishment to which he may by law be subject, shall be liable to an imprisonment for such time, during the session of the Legislative Assembly then being held, as may be determined by the Legislative Assembly."

Section 48 enacts that "The determination of the Legislative Assembly upon any proceeding under this Act and within the legislative authority of this Province, shall be final and conclusive."

It is sufficient to observe from these provisions that they

are made expressly without prejudice to the liability of the offender to prosecution and punishment, criminally or otherwise, according to law, independently of this Act, and the punishment imposed is in addition to any other penalty or punishment to which he may by law be subject.

It would have been beyond the power of the Legislative Assembly to deal with conspiracy as part of the criminal law, because "the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters," is by the British North America Act, sec. 91, sub-sec. 27, vested exclusively in the Parliament of Canada.

The like answer applies to the 47 Vic. ch. 4, sec. 46, sub-sections 2 and 3 (O.)

The punishment under the Ontario Acts, "imprisonment for such time during the session of the Legislative Assembly," so far as these defendants are concerned, who are not members of the Assembly, may be only for a day, or for a few days, or for a few weeks at the most, although the case may be of the most flagrant description, shows, in addition, the Legislative Assembly had no intention of dealing with the criminal prosecution of any case which is within the scope of the criminal law, the punishment of such a case as this being by 32-33 Vic. ch. 29, sec. 86, D., imprisonment in the Penitentiary for a term not exceeding seven years, and not less than two years, or in any gaol or place of confinement for any term less than two years with or without hard labour, and with or without solitary confinement.

As the Legislative Assembly has not assumed and plainly did not assume to deal with any case governed by the criminal law, the defendants may feel relieved that the dignity of Parliament is in no way touched by this prosecution being allowed to go on in the ordinary criminal courts of the country.

The case of *The Commonwealth v. McCook*, referred to in *Wigram's Precedents of Indictments* 1012, was a prosecution for conspiracy for attempting to bribe a member of

the Pennsylvania Legislature. That no case has been found of an indictment of the like kind in the English Courts is an argument of no weight.

The Superior Courts have a general criminal jurisdiction, and the House of Commons has not and never had.

In 3 *Chitty's Criminal Law* 684, 2nd ed., note (a), it is said "The text books in general confine the offence of bribery to a bribery of judicial officers, but this seems incorrect."

And in *Archbold Criminal Pleading*, 19th ed., 891, it is said: "The text books in general confine the offence of bribery to a bribery of judicial officers, but this definition of the offence seems too narrow and confined."

The case of *Rex v. Plympton*, 2 Ld. Raym. 1377, was a prosecution for promising a member of a corporation money to vote for the election of mayor.

In *Rex v. Pitt*, 3 Burr. 1335, 1 W. Bl. 380, an information at the common law was granted for bribery of voters at an election for members of Parliament, and after conviction it was argued for the defendants that the Court had no jurisdiction at common law to punish bribery at elections to Parliament. "There is no instance of any such judgment given by this Court, which proves that there can be none given by them. The House of Commons are the proper Judges of this matter;" referring to *Long's Case*, 4 Inst. 23, where it was said the House of Commons adjudged *secundum legem et consuetudinem parliamenti*.

Lord Mansfield said: "That was for a *contempt*, in which case the House of Commons had jurisdiction," p. 1336; and at p. 1339 it appears that several informations of the like kind had been allowed by the Court. And he added: "This crime certainly still remains a crime at common law. The Legislature never meant to take away the common law crime, but to add a penal action."

An information was granted for attempting to bribe a Privy Councillor, and it is said: "No doubt this is an offence at common law": *Rex v. Vaughan*, 4 Burr. 2494, per Yates, J. at p. 2501.

An indictment was found against the clerk of an agent for French prisoners for taking bribes to procure the exchange of some of them out of their turn: *Rex v. Beale*, cited in 1 East 183; *Joliffe's Case*, referred to in 1 East 154; *Rex v. DeBerenger*, 3 M. & S. 67; *The Queen v. Aspinall*, 1 Q. B. D. 730, 2 Q. B. D. 48. See also 2 *Wharton's Criminal Law*, 8th ed., secs. 1857, 1858.

It is to my mind a proposition very clear that this Court has jurisdiction over the offence of bribery as at the common law in a case of this kind, where a member of the Legislative Assembly is concerned either in the giving or in the offering to give a bribe, or in the taking of it for or in respect of any of his duties as a member of that Assembly; and it is equally clear that the Legislative Assembly has not the jurisdiction which this Court has in a case of the kind; and it is also quite clear that the ancient definition of bribery is not the proper or legal definition of that offence.

It may be said that if the defendants are proceeded against in this Court, they may also be proceeded against by the Legislative Assembly for the violation of their rights and privileges according to the provisions of the statute law of the Province, and so they will be subjected to be twice punished for the same offence. The answer to that is, that the present proceedings and the punishment which may be awarded by the Legislative Assembly are not for the *same* offence. This proceeding is for the infraction of the criminal law. The proceedings of the Legislative Assembly are for a contempt, which, if taken, are taken in their own defence, for the violation of their own rights and privileges.

But if it were the same offence, it does not follow that the one may not be superadded to the other, as in the case of *Rex v. Pitt*, 3 Burr. 1336, where it was held the defendant might be prosecuted as at common law, and under the statute against the bribery of voters, for the statutory penalty did not interfere with the offence at the common law.

I understand the case of *The Attorney-General of N. S. Wales v. McPherson*, L. R. 3 P. C. 268, at pp. 272, 273, 280, to establish that for an assault, &c., committed in the face of the Legislature, the offender can be proceeded against at law for the criminal offence, and also by the House for his contempt of the Parliamentary law.

But if the two proceedings are to be considered a double punishment for the same offence, which law proceeding is to give way? Is it the special law of Parliament, or the general law of the land? I say it is not the general law of the land.

In many cases a delinquent is doubly punished, although not by the law. If a bank clerk embezzles the money of his employers and is convicted, his masters do not retain him as their clerk, but dismiss him.

If the member of a club or lodge is convicted of any degrading offence, he is removed from his membership. If a member of the Legislative Assembly be convicted of forgery or the like, he is expelled the House. These are punishments, although they are not noticed as such by the law.

But besides the case *Rex v. Pitt* there are other cases in which the parties are twice punished at law, although not literally for the *same* offence.

If one steal from or assault another he is not only punishable for the criminal *offence*, but he is punishable for the civil wrong he has done to the party aggrieved.

As I am of opinion this Court has jurisdiction over this offence of conspiracy, and over the offence of bribery, so far as that is material to be considered, I proceed now to consider the objections taken to quash the indictment.

The first and second objections may be taken together. They raise the question whether the indictment does or does not contain a count or counts which was or were contained in the information before the Police Court, or which is or are founded upon facts or evidence disclosed in any examination or depositions taken before any Justice of the Peace in the presence of the persons accused of the offences

charged in the indictment, and transmitted or delivered to such Court in due course of law.

The first charge or count of the information states the defendants conspired "to corrupt, deprave, impair, alter, and frustrate the constitutional procedure and action of the Legislative Assembly, and the members thereof in their votes and proceedings therein, by bribing certain members of the Assembly to vote in opposition to the existing Executive Government, and the members of the Assembly supporting such Government, upon questions arising and to arise therein;" and it concludes that the defendants did the acts complained of "to influence the said members (naming them) as members to vote in opposition to the existing administration of the Executive Government, and to their supporters, members of the said Assembly."

The second charge or count of the information alleges the conspiracy to have been "to subvert, change, alter, defeat, and overthrow the then existing Executive Government of the Province:" in other respects it is similar to the first.

The first count of the indictment is in substance similar to the first charge in the information, excepting that the first count of the indictment alleges the object of voting against the members of the Executive Government was to induce the Lieutenant-Governor to dismiss the members of the Executive Council, and to appoint others in their stead.

That object is no part of the *offence* of conspiracy.

A count in conspiracy is sufficient which alleges the offence to have been by divers false pretences and subtle means and devices to obtain and acquire to themselves of and from A divers large sums of money of the money of A, and to cheat and defraud him : *The King v. Gill*, 2. B. & Al. 204 ; *O'Connell v. The Queen*, 9 Jur. 25 ; *Regina v. Kenrick*, 5 Q. B. 49.

The addition to this count of the indictment which I have referred to is restrictive, and not in enlargement of the first charge in the information. The second charge in

the information supports in all respects the second count of the indictment, and in my opinion the first count of the indictment also. This indictment, then, contains "a count or counts for an offence mentioned in the 32-33 Vic. ch. 29, sec. 28," and "such count or counts may lawfully be joined with the rest of this indictment," and "the same count or counts is and are founded upon the facts or evidence disclosed in the examination or deposition taken" in the Police Court.

The third count of the indictment, which is a mere variation of statement in the circumstances of the conspiracy before charged, may be joined with the other two counts; and besides that, the third count itself is founded upon the facts or evidence disclosed in the examination or depositions taken in the Police Court.

As I have already said, I understand the learned Chief Justice at the Assizes did decide the indictment was supportable against that objection, and in that respect I quite agree with him.

The third and fourth objections in the rule to quash may be considered in the observations upon the demurrer which raises the same questions.

The fifth objection in the rule is, that the defendants are charged with separate and distinct offences in the different counts of the indictment. To which I may answer, why not? In misdemeanours there may be different counts: *Rex v. Johnson*, 3 M. & S. 539; *O'Connell v. The Queen*, 9 Jur. 25. In *Regina v. Murphy*, 8 C. & P. 297, conspiracy and libel were joined.

It is no ground for arresting judgment that distinct felonies are joined in the indictment. The proper course is, to move to quash the indictment, or to apply to the Judge to compel the prosecutor to elect: *Regina v. Heywood*, 33 L. J. M. C. 133.

The sixth ground of the rule, as to the jurisdiction of the Court and the power of the Legislative Assembly in this proceeding, have been already considered.

The seventh ground falls with the failure of the sixth ground.

Then as to the objections taken by the demurrer. The first is, that it is not said the members who were attempted to be bribed to vote were to vote *as* members of the Legislative Assembly.

The count states :

1. That the defendants and others conspired, by corrupt means, to influence and procure certain members of the Legislative Assembly to vote in favor of a resolution.

2. Which should be introduced into the said Assembly by certain members of the Assembly.

3. Which should declare that the members of the Executive Council did not possess the confidence of the majority of the members of the Assembly.

4. To the intent that the members of the Executive Council should be dismissed from their office as Executive Councillors.

It appears very clearly that the persons to be influenced, and who were to be procured to vote, were *members* of the Legislative Assembly, and that they were to be influenced and procured *to vote upon a resolution* which should be *introduced into the Assembly*, and which may be described as a resolution of want of confidence, to the intent that the members of the Executive Council should be dismissed from their offices as such councillors.

If the votes to be influenced by such means were votes to be given upon a resolution which should be *introduced* into the Assembly by members of the Assembly, and were to be given to bring about the result alleged, the votes to be given upon such a resolution must have been given, and could only be given by the parties voting *as members* of the Assembly.

If such votes were not given *in the Assembly*, any resolution that the members of the Executive Council did not possess the confidence of a majority of the members of the Assembly could not have had the least practical effect, and *the intent* of the defendants *thereby* to induce the

Lieutenant-Governor to dismiss the Executive Councillors, and to appoint others in their stead, could not have been effected.

The whole scope and frame of the count shew the members of the Assembly who were to be influenced to vote were to be influenced to vote *as* members of the Assembly.

The certainty required in an indictment is that middle kind of it known by the phrase, "certainty to a certain intent in general," which it is said requires that "everything which the pleader should have stated, and which is not either expressly alleged or by necessary implication included in what is alleged, must be presumed against him": *Archbold's Cr. Pl.*, 19th ed., p. 58.

In *Chitty on Pleading*, 6th ed., p. 234, it is said, "'Certainty to a certain intent in general' means what, upon a fair and reasonable construction, may be called certain without recurring to possible facts which do not appear, and is what is required in declarations, replications, and indictments, in the charge or accusation."

The charge must contain such a description of the crime so that without intending anything but what appears the defendant may know what he has to answer, and what is intended to be proved in order that the jury may be warranted in their verdict, and the Court in the judgment they are to give: *Rex v. Horne*, Cowp. 627, at p. 682.

In *The King v. Lyme Regis*, 1 Doug. at p. 159, Buller, J., said: "'Certainty to a certain intent in general' is sufficient as in counts, replications, &c.; and so in indictments; and I take it to mean what upon a fair and reasonable construction may be called certain without recurring to *possible* facts which do not appear." He also said: "If the return" (which was to a mandamus) "be certain on the face of it, *that* is sufficient, and the Court cannot intend facts inconsistent with it for the purpose of making it bad. * * If presumptions are to be allowed, certainty in every particular would be necessary, and no man could draw a valid and sufficient return."

The term "Frozen Snake," was held to be libellous without an innunendo.

In *Hoare v. Silverlock*, 12 Q. B. at p. 632, Patteson, J., said: "Any ordinary person would be able to say what the allusion was, and the jury have found it."

The motion was to arrest the judgment, but he considered the motion as if it had come before the Court upon a demurrer.

Coleridge, J., said: "As to the necessity of an innunendo, the jury and Court in such a case as this are in an odd predicament if they alone of all persons are not to understand the allusion complained of," &c.

And that is what was said by Lord King in *Rex v. Matthews*, 15 Howell's St. Tr. at p. 1391, in speaking of a publication (referred to in *Rex v. Horne*, Cowp. at p. 688,) "that the Court and jury must understand the record as the rest of mankind do." He said that in answer to the objection, that it could not be understood who the *chevalier* was without some special averment.

In *The Queen v. Rowlands et al.*, 17 Q. B. 671, for conspiracy by unlawfully *molesting* the workmen in the employ of the prosecutors in their trades and business, to force the workmen to depart from their employment, and by *molesting* the prosecutors to force them to make an alteration in the mode of carrying on their trade, and by *obstructing them* for the like purpose, and by *intoxicating* the workmen to carry them away, and thereby prevent them from continuing at their work, it was held that the different counts alleged that illegal means and acts were used in carrying out the conspiracy; but that certain counts, of which one may be sufficient to refer to, were too general; that is, a count which alleged the means to be "unlawfully to intimidate, prejudice, and oppress the prosecutors [naming them] in their trade, &c., and to prevent their workmen from continuing to work for them in their trade, &c." was too general. It was urged in that case, "that it is not sufficient to state as the offence that which is only the legal result of certain facts; but the facts

themselves must be specified, that the Court may judge when they amount in law to the offence." Lord Campbell, C. J., at p. 681, said: "That is where the *corpus delicti* charged is the act in violation of the statute; here the *corpus delicti* is the conspiracy to do what is forbidden by the statute."

It was also argued that "it should have been stated the absence was for some given time, and without lawful excuse." The Chief Justice answered: "If the conspiring was well laid it would be of no consequence to shew what the absence in fact was." And to another objection he said: "The objection there was rather to the generality of the object as alleged, than of the means. Perhaps the count in *Rex v. Biers*, 1 A. & E. 327, might not have been good, however specifically the means had been set out." So when it was said the Court could not give any sensible construction to the counts which alleged *intoxicating* the workmen as the means of carrying out the conspiracy, the Chief Justice said: "Intoxicating is not laid as the *corpus delicti*." And Coleridge, J., said: "It has been held of late here that the Courts have more common sense than some of the old decisions give them credit for. We have considered that such expressions as 'Frozen Snake' and 'Man Friday' may be understood by us as a person out of Court understands them. A person out of Court would understand what was meant by a man intoxicating another."

So when it was argued that "to entice and seduce away" workmen was no offence according to *Regina v. Daniell*, 6 Mod. 99, the Chief Justice said: "The count charges a conspiring to do it."

I must say the count does with proper certainty charge that the parties to be influenced to vote were not only members of the Legislative Assembly, but that they were to vote in the Assembly, upon a resolution which it was purposed should be *introduced* there, to effect a purpose which could have been effected only by a vote given in the Assembly; and that the proper mode of reading and

understanding the count is by giving it "a fair and reasonable construction without recurring to *possible* facts, which do not appear," and in my opinion the exception cannot be sustained.

The second objection is, the count does not show for what purpose the money was to be paid, or for what purpose the office was to be secured, or by whom the money was to be paid, or by whom the promise of office was to be made.

The count alleges the defendants conspired to influence the members of the Assembly referred to to vote upon the resolution mentioned, "by the payment of certain bribes to wit, the payment of certain sums of money, and the promise of the procurement for them of their appointments to certain offices of emolument under Her Majesty, and divers other valuable considerations to the jurors unknown."

If it be necessary to state with more particularity the matters in that count contained, as contended for by the defendants, the rule of certainty required, "certainty to a certain intent in general," must be disregarded, and "certainty to a certain intent in every particular," which applies only to matters of estoppel, pleas in abatement, and the like, must be adopted in its stead.

Influencing members of the Assembly to vote as in the count mentioned by the payment of certain bribes, &c., shews plainly the purpose for which the money was to be paid was *to influence the members to vote*; and so, also, as to the promise of the office.

It is certainly not necessary to allege by whom the money was to be paid. It is not of the essence of the offence the paymaster should be known. The important matter is, that money or the like was to be paid or given. So it is not necessary it should appear the party promising had the power or the right to promise the procurement of the offices. It is sufficient that such a promise was made.

At elections the person to pay may or may not be the person who makes the promise, and the payor may or may not be known by either of the parties. The promise may

be, "if you, the voter, vote for such a person, you will be paid so much." The promissor is guilty of an offence, and if he be the agent of a candidate who is elected, the election may be vacated.

The offence of conspiracy is complete by the illegal confederacy to do an illegal act, or to do an act not illegal by unlawful means : *Rex v. Gill*, 2 B. & Al. 204 ; *The Queen v. Kenrick*, 5 Q. B. 49 ; *O'Connell v. The Queen*, 9 Jur. 25, before cited.

A conspiracy to obtain goods from divers persons without paying for them, is not necessarily a fraud, as goods might lawfully be obtained without paying for them. So an indictment for a conspiracy to make a fraudulent deed without showing how it was fraudulent, was held not to be sufficient : *The Queen v. Peck*, 9 A. & E. 686.

I do not think it can be required to be averred that the defendants could have procured the appointments to office which they promised, any more than that there was a fund sufficient to pay the moneys which they had promised to pay, or from which it could be paid.

It cannot be necessary to allege all the particulars taken by this objection, as a count of the kind is sufficient which charges that the act was done to defraud the party of *divers* goods : *Rex v. ———*, 1 Ch. R. 698. So *divers* creditors : *Regina v. Peck*, 9 A. & E. 686. So *certain imported goods* : *The Queen v. Blake*, 6 Q. B. 126. So to defraud the party of "his goods and chattels : " *Sydserrff v. The Queen*, 11 Q. B. 245 ; and more particularly when *the means* by which the object is to be effected *need not be stated* : *Rex v. Gill*, 2 B. & Al. 204, and *The Queen v. Kenrick*, 5 Q. B. 49.

The third ground is, it is not shewn the payment of money or the promise of an office was for a corrupt purpose.

The count says it was for the members of the Assembly in question voting on the resolution referred to, to effect the dismissal of the Executive Councillors, and that is a corrupt purpose. It is not necessary the purpose to be

effected should be corrupt. If the *means* are corrupt, it is an offence, although the purpose may have been otherwise free from objection. It is a fanciful ground that the money promised might have been money which the promissors were indebted to the promisees in, and that the defendants were, in fact, only promising to pay their just debts. That idea is at variance with the whole tenor of the indictment.

The further ground is, it does not appear the persons sought to be corrupted were to be corrupted as members of the Legislative Assembly.

I am of opinion it does distinctly appear, as I have already stated, that it was as members they were sought to be corrupted.

The fifth ground is, the character and terms of the resolution should have been more specifically set out.

The resolution is said to have been one "which *should declare* that the members of the Executive Council did not possess the support and confidence of the majority of the members of the Legislative Assembly. So that what is complained of could not have been stated, for it appears the resolution was not then written or framed, or in existence at the time in question: *Rex v. Gill*, 2 B. & A. 204. But whether it was or not the terms of it are quite sufficiently stated.

The sixth objection is, the ordinary Courts of the Province or of the Dominion have no jurisdiction in a case of this kind, because the sole jurisdiction over the offence can be competently dealt with by the Legislative Assembly, inasmuch as the offence is a breach of the law and custom of Parliament.

There is nothing more definitely settled than that the House of Commons in England, and the different colonial Legislatures, have not, and never have had, criminal jurisdiction.

The House of Commons is called the Grand Inquest of the nation for impeaching offenders before the House of Lords as the highest criminal Court in the kingdom.

The Legislative Assembly of this Province has no control, even by legislation, over the criminal law of the country, nor over the procedure in criminal proceedings. The very legislation which was referred to by the defendants' counsel as supporting their contention is a disclaimer of it, if a disclaimer be required, as has been already stated.

The late case of *Wason*, L. R. 4 Q. B. 573, which was strongly relied upon by the defendants' counsel, does not, I think, support the argument that the offence in this case is cognizable only by the Legislative Assembly, because the conspiracy, if it can be called so, in that case was held not to be cognizable by the Courts.

The charge was, a conspiracy had been formed by two members of the House of Lords and the Chief Baron of the Exchequer, to prevent an enquiry being made into the matter of a petition presented by Wason to the House of Lords against the Chief Baron, by means of false statements which the two members of the House of Lords were to make in the House for the purpose of deceiving the House, and which statements they knew to be untrue; and the Court held that a conspiracy by these parties that the members should make false statements in the House was not an offence at law, because the Court could not take notice of any statements made or to be made in the House, nor could the Court enquire into the motives and intentions of those who made or were to make them.

Now, keeping in mind what a conspiracy is—an agreement (called unlawful by reason of its purpose and object) to do an illegal act, or to do an act not necessarily illegal by illegal means—and keeping in mind that if the act to be done be illegal in itself the conspiracy is complete, although there is no consideration or inducement for the doing of the act, as a conspiracy to murder or the like; but if the act to be done is not illegal in itself, then that the means by which the conspiracy is to be effected must be shewn, and they must appear to be illegal means, as by bribery or otherwise—it may now be asked, under which of these two heads of conspiracy, that is, to do an

illegal act, or to do an act not illegal by unlawful means. Does *Wason's Case* range? Not under the former, for no illegal act was to be done which the Courts could inquire into anything of. There was not the power to inquire into what statements were made, or were to be made, by members in parliament, nor into their truth or falsity, nor into the purpose or motives of those who made them, nor into who were to make them. That inquiry, then, being excluded by the *lex parliamenti*, there could not in law be a conspiracy, for all that remained of the charge was that an agreement had been made to do something, but what was to be done something was no one could tell.

Nor did *Wason's Case* come under the second head, for there were no illegal means used, or to be used.

But if these three persons had agreed that the members of the House of Lords should make these statements, or vote in any particular manner, in consideration of a bribe paid or to be paid to them, that would have been a conspiracy to do an act, not necessarily illegal in itself, but to do the act by illegal means, bribery being an offence against the law; and the offence of conspiracy would have been complete by reason of the illegality of the means by which the act was to be effected.

That offence could have been inquired into by the Courts, because the inquiry into all that was done would have been confined to matters outside of the House of Lords, and there would therefore be no violation of, or encroachment in any way upon, the *lex parliamenti*.

The argument of the defendants' counsel was strongly pressed upon us as a defence of bribery in political matters, and as a valued branch of the *lex parliamenti*, and that all such cases were beyond the cognizance of the general law of the land. I have not been able yet to see matters so clearly in that light.

But the present is not even that case. Here the defendants, who are not members of the Legislative Assembly, conspired, as it is alleged, among themselves to bribe members of the Assembly to vote in a particular manner.

for a particular purpose in the House, and that, unquestionably, is a criminal offence cognizable by the Courts of the country. No member of the Assembly, as this record shews, was a party to the offence. The members were to be operated upon; but what difference does that make? Why are persons who by conspiracy bribe or attempt to bribe members of the Assembly not offenders against the law of the land? It was said by the defendants' counsel, because the Courts cannot enquire into the conduct or statements of members in the Assembly. But what enquiry of that kind has to be made in such a case? None whatever; none conceivable. It is a fallacy, or pretence, and it sounds somewhat like an absurdity, in my opinion, to say so.

I say without doubt or hesitation the offence charged against the defendants is a plain violation of the criminal law of the land, and an offence too which I may say, if true, is aggravated by its being practised upon or against members of a legislative body.

I am of opinion, therefore, the indictment should not be quashed upon any of the grounds mentioned in the rule *nisi*, and I am of opinion the indictment is sufficient in law, and that judgment should be entered for the Crown against the defendants, which judgment it appears is the same as in civil actions: *Rex v. Taylor*, 3 B. & C. 502; but that the defendants, according to *Regina v. Birmingham R. W. Co.*, 3 Q. B. 224, be allowed to plead over to the indictment, upon the terms that they plead the usual plea of not guilty to the same, on or before Thursday next, otherwise that judgment be entered for the Crown.

ARMOUR, J.—I think it beyond doubt that the bribery of a member of the Legislative Assembly of the Province of Ontario to do any act in his capacity as such is an offence at the common law, and is indictable and punishable as a misdemeanour.

The impeachment of Thomas, Earl of Macclesfield, for bribery, was founded upon the common law: 16 *Howell's State Trials*, 767.

The attempt to bribe a privy councillor to procure an office was held to be an offence at common law: *Rex v. Vaughan*, 4 Bur. 2495.

It was held that bribery was a sufficient cause to remove the mayor of a corporation from office; for, as was said by the Court, it was an offence by which the very constitution of the government might be altered: *Rex v. The Mayor of Tiverton*, 8 Mod. 186.

To bribe persons, either by giving money or promises, to vote at elections of members of corporations which were created for the sake of public government, was held to be an offence for which an information would lie: *Rex v. Plympton*, 2 Ld. Raym. 1377.

Bribery by a member of a corporation was held to be an indictable offence: *Rex v. The Mayor and Aldermen of Carlisle*, 11 Mod. 378.

In *Rex v. Cripland*, 11 Mod. 387, the Court held it was an offence for which an information would lie for one of a corporation to endeavor to corrupt another in an election of a member.

To bribe a juryman was held to be an offence indictable at common law: *Rex v. Young*, cited in *Rex v. Higgins*, 2 East 5.

A clerk to the agent for the French prisoners of war at Porchester Castle was indicted for taking bribes in order to procure the exchange of some of them out of their turn: *Rex v. Beale*, cited in *Rex v. Gibbs*, 1 East 173.

In *Rex v. Pitt and Mead*, 3 Burr. 1335, S. C., 1 W. Black. 380, Lord Mansfield, said bribery at elections for members of Parliament must undoubtedly have always been a crime at common law, and consequently punishable by indictment or information.

It was held that an action of slander would lie for charging a candidate with bribery at a Parliamentary election, because bribery was an indictable offence: *Bendish v. Lindsey*, 11 Mod. 194.

The United States v. Worrall, 2 Dall. 384, was an indictment at Common law for attempting to bribe the Commissioner of Revenue.

Bribery of a voter to vote at a municipal election was held to be indictable at the common law : *The State v. Jackson*, 73 Maine 91.

In *The State v. Ellis*, 33 N. J. L. R. 102, an attempt to bribe a member of the common council of Hudson City to vote for an application to lay a railroad track on one of the streets of the city was held to be an offence indictable at common law, and it was there said that any attempt to influence an officer in his official conduct, whether in the executive, legislative, or judicial department of the Government, by the offer of a reward or pecuniary compensation, was indictable as bribery.

In *Walsh v. The People of The State of Illinois*, 65 Ill. 58, an offer by an alderman of the common council of the city of Chicago to take a bribe to influence his action in the discharge of his duties was held to be an offence indictable at common law.

This Court held, in *Regina ex rel. McKeon v. Hogg*, 15 U. C. R. 140, that bribery at a municipal election was an offence at common law.

In *The Commonwealth v. McCook*, cited in *Wharton's Precedents*, sec. 1012, note, the defendant was held to be indictable at common law for attempting to bribe a member of the House of Representatives of the Commonwealth of Pennsylvania.

I refer also to *Allen v. Hearn*, 1 T. R. 56; *Hughes v. Marshall*, 2 C. & J. 118; *People v. Sessions*, 62 Howard's Pr. Rep. 415; *Commonwealth v. Shaver*, 3 W. & S. 338; *Commonwealth v. Silsbee*, 9 Mass. 417; *Commonwealth v. Hoxey*, 16 Mass. 385; *State v. Ames*, 64 Maine, 386; *State v. Carpenter*, 20 Verm. 9; *State v. Collier*, 72 Mo. 13; *State v. Purdy*, 36 Wis. 213; *Barefield v. State*, 14 Ala. 603; *Commonwealth v. McHale*, 97 Penn. 397; *People v. Thornton*, Albany Law Journal, December 3, 1881, page 441; *Wharton's Crim. Law*, 8th ed., sec. 1857; *Bishop's Crim. Law*, 6th ed., vol. 2, sec. 85.

An agreement between two or more persons to commit any offence punishable by law is a conspiracy, and is indictable and punishable as a misdemeanour.

I think a conspiracy to commit the offence of bribery is sufficiently charged in the indictment, and that the indictment is not defective for the objections urged against it; but if it were, it might and ought to be amended: 32-33 Vic. ch. 29, sec. 32; and I do not think that the motion to quash the indictment can prevail.

It is contended, however, that the offence charged in the indictment is one cognizable solely by the Legislative Assembly of the Province of Ontario, and can not be prosecuted in this Court.

There is no plea raising this question, and it is not properly before us; but, as it was argued, it may as well be disposed of.

The House of Commons of England never had any general criminal jurisdiction, and the Legislative Assembly of the Province of Ontario still less has any, and by the R. S. O. ch. 12, it carefully avoids taking to itself the jurisdiction to try and punish as crimes the offences therein provided against, and it would not have had the power had it desired to do so: *Burdett v. Abbot*, 14 East 1.

In my opinion the motion to quash must be denied, and judgment must be given for the Crown upon the demurrer.

O'CONNOR, J.—Several objections were made on behalf of the defendants to the indictment; some of them on the ground of form, such as that the allegations were too general, not sufficiently specific, &c.; but in the view which I take of the case on the merits, I think it unnecessary to consider these objections.

The main question raised on the argument is, do the matters alleged in the indictment disclose an indictable offence? I think they do not.

It is evident, from what appeared on the argument, that the case was well worked up on both sides. The arguments and authorities adduced shew clearly enough that the records and reports of the decisions, ancient and modern, of the Courts, and the text books, old and new, including American cases and text books, have been

searched for authorities having even a remote bearing on the case; and it is noteworthy that no case precisely like this has been found. I mention this, not as conclusive against the indictment, but as affording a strong presumption that the total absence of such a case, or reference thereto, is not referable to mere accident. It is highly probable that circumstances of a like nature to those mentioned in the indictment have frequently occurred before, and if the criminal law of the land has not been heretofore invoked, I think it affords a presumption by no means violent that such cases are not within the cognizance or scope of the criminal law.

Amongst the authorities cited, however, there is one case sufficiently analogous to the present one to be considered an authority establishing the principle, *ratio decidendi*, which ought to govern this case. That case is *Ex parte Wason*, L. R. 4 Q. B. 573.

The facts were briefly these: Wason had given to Earl Russell a petition from himself to the House of Lords, which the Earl had promised to present. The petition distinctly charged the Lord Chief Baron with having, when a Queen's Counsel, told a wilful and deliberate falsehood to a committee of the House of Commons sitting as a judicial tribunal.

The petition prayed an inquiry into the charges, and if found true that the law which declared that it may be lawful to remove Judges by addresses from both Houses of Parliament might be put into operation.

The petition was not adopted or acted on by the House of Lords, and Wason went before a magistrate, and laid an information, charging that Earl Russell, Lord Chelmsford, and the Lord Chief Baron had prevented the course of justice and had injured him, a third party, by making statements which they knew were not true, to prevent the prayer of his petition being granted. He then proceeded to charge that the three parties named had conspired and agreed together to prevent the course of justice and to injure a third party, namely, himself: that the conspiracy

to prevent the course of justice consisted in the fact that the parties agreed to state the falsehood, that the state in the petition against the Lord Chief Baron was untrue, when they knew it was perfectly true.

The magistrate took time to consider whether he ought to act upon the information or not, and then he declined to act. Thereupon Wason applied to the Court of Queen's Bench for a rule calling on one of the metropolitan police magistrates to shew cause why he should not proceed upon the charge for conspiracy. The rule was refused, and Cockburn, C. J., in his judgment, says: "I entirely agree that, supposing the matter brought before the magistrate had been matter cognizable by the criminal law, and upon which an indictment might have been preferred, the magistrate would have had no discretion, but would have been bound to proceed * * The question is, whether the matter brought by the present applicant before the magistrate was subject-matter for an indictment. To ascertain this we must look at the information. * *

"It seems to me that the fair and legitimate inference is, that the alleged conspiracy was to make and that the statements were made in the House of Lords. I think, therefore, that the magistrate, looking at this and the rest of the information, was warranted. * *

"Such a charge could not be maintained in a Court of law. It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the parties guilty of it amenable to the criminal law."

Blackburn, J., said: "I perfectly agree with my Lord as to what the substance of the information is; and when the House is sitting and statements are made in either House of Parliament, the member making them is not amenable to the criminal law. It is quite clear that no

indictment will lie for making them, nor for a conspiracy or agreement to make them, even though the statements be false to the knowledge of persons making them. I entirely concur in thinking that the information did only charge an agreement to make statements in the House of Lords, and therefore did not charge any indictable offence."

Lush, J., said: "I am clearly of opinion that we ought not to allow it to be doubted for a moment that the actions or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." Hayes, J., concurred.

Bradlaugh v. Gossett, L. R. 12 Q. B. D. 271, is a recent authority for the position that what is said or done within the walls of Parliament—in either House—cannot be inquired into by the Courts of law. From this rule treason, felony, and assault are, however, excepted: 2 *Stephen's Com.* p. 243. The Statute 1 W. & M. St. 2, c. 2, declares as one of the liberties of the people, "that the freedom of speech, and debates and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." 1 *Blackstone's Com.* by Kerr (4th ed.) p. 132; and this is the ninth Article of the Bill of Rights.

In *Ex parte Wason*, above cited, one of the persons charged with conspiracy was not a member of the House of Lords, so that the conspiracy, if a fact, must have been formed outside of the House; and it was to do something in the House, just as is alleged in the case now under consideration. In that as in this case the alleged conspiracy was to procure the doing of something in the House, by members in their places, in the course of business in the House, within its jurisdiction. In that case it was to speak falsely in reference to a petition pertaining to the course of justice; in this case it was to vote for a certain resolution, in order to effect a change in the Executive Council—commonly called a change of government.

But that case is really a stronger one, at least theoretically, for the interference of a Court of justice than the present; for there Wason alleged a conspiracy to interfere with and hinder the course of justice, to the prejudice of an individual, which has always been an indictable offence, except when it concerns matters in parliament.

This cannot be alleged of the matters charged in this case. A conspiracy in the eye of the criminal law must be to commit or attempt to commit or cause to be committed an indictable offence; or it may be to cause or procure something to be done, or the omission to perform some duty, by means illegal, that is, by means known to the criminal law as an offence. A conspiracy to do or to induce others to do that which is not cognizable to and indictable by the criminal law, by innocent means, is itself not cognizable by the criminal law, and the parties to it are not indictable, however immoral and wicked *per se* the object sought to be attained by the conspiracy may be.

In this case the defendants are charged with having conspired to influence by bribery certain members to vote in a certain way in the House apparently to suit the object of the alleged conspiracy.

The object was to effect a change of the Executive Council. Here arises a question which supplies the reason for the rule laid down by the Court in *Ex parte Wason*.

That rule is founded on a plain principle of public policy, which prohibits inquiry respecting what takes place in the Houses of Parliament.

A change of government may be desirable in the public interest, or for the public good. If it should be for the public good—*salus populi suprema lex*—it may be argued, at least plausibly, that extraordinary means, such even as are commonly called bribery, may be resorted to for the end proposed. Be this, however, as it may, public policy requires that such matters should be the subject of investigation by no other tribunal than Parliament itself, for no other tribunal is engaged in political matters, and can as well judge of political motives.

Admit that such a conspiracy was made, as for the purposes of the demurrer it is admitted, and that the members named were induced and influenced, as alleged, to vote, and that they did vote accordingly, their act, though corrupt and a clear contempt of the law and privileges of Parliament, was not and is not cognizable by the general law of the land, either civil or criminal, as administered by the ordinary Courts of justice; and the members not being for such an act amenable to such Courts are not indictable. The alleged conspiracy, therefore, was to effect an object not within the scope of the criminal law, not cognizable by nor within the competence of the criminal Courts, was to effect an object whereof the criminal law and the Courts know and can know nothing; and therefore the defendants are not, on principle, indictable.

I desire it to be understood, however, that I do not hold that a member of Parliament is not amenable to the ordinary Courts for anything he may say or do in Parliament. I merely say he is not so amenable for anything he may say or do within the scope of his duties in the course of parliamentary business, for in such matters he is privileged and protected by *lex et consuetudo parliamenti*; and for his protection, and the preservation of its own integrity, honour, and efficiency, Parliament has reserved to itself the exclusive privilege and authority to investigate and decide all matters that arise concerning either House thereof.

This, it seems, has been the law and practice since the time of the Long Parliament, and it received distinct confirmation in the reign of Charles II. (A. D. 1667) when the Commons, relying on the Statute 4 Henry VIII. c. 8, as a general enactment, voted that the judgment against Sir John Eliot and others, for what they had done in Parliament in the reign of Charles I., was illegal; and that judgment was afterwards, by the consent and suggestion of the House of Lords, formally reversed upon a writ of error. *Vide Broom's Constitutional Law* 864, 865; *Hallam's Const. Hist.* (8th ed.) vol. ii., p. 7.

That bribery of members of Parliament has occurred at times innumerable is but too well attested by history and experience. The parliamentary history of the time of Walpole and of some of his successors; the history of the Act of union between England and Ireland, and of the means used to carry it in the Irish parliament; the "rolling" at the various Legislatures of the United States and the "lobbying" at our own Legislatures, afford instances numerous and various of the means by which members have been induced to vote as they would not have voted, had they not been influenced by special means of a personal, and not seldom of a selfish character.

That it has been so in the past, and is likely to be frequently in the future, is to be deplored as an evil; but I fear it is one of the evil results of the imperfection of human nature for which there is no absolute remedy within man's power. The Constitution requires, very properly, the very nature of parliamentary business requires that the communication between members of Parliament and their constituents should be free from restraint of any kind, and quite unrestricted by arbitrary rules. The intercourse between the public at large, as well as his constituents, and him, is also free, and he is liable to be influenced more or less in his conduct by public opinions and expressed wishes in all public and in private matters. Thus he is constantly in contact with parties outside of Parliament, and in the way of being influenced by them in various ways, and by various devices not always patent, but seductive, and sometimes when properly regarded, corrupt. The promise of office is not infrequently used as a baited hook with which to catch the unwary. Dinners, wine, and jovial intercourse open the way to confidence with the usual results of undue and free corrupt influence. The direct offer of money is seldom resorted to in such cases, and it may properly be not unfairly presumed that it never is resorted to if it be known or shrewdly suspected that the member is under the temptation of that kind. But, however, this m

practice of bribery is many-sided, and bribery is effected or attempted in various ways. For instance, few practices are more common in parliamentary matters than that of the promoters of a bill for the incorporation of a railway or other great corporation influencing or attempting to influence members of Parliament to promote the project and vote for the passage of the bill by naming them as provisional directors, or holding out other prospects of personal advantage for a like purpose; nor is the payment or agreement to pay money in such cases and for such influence entirely unknown.

Agreements, called collateral, are frequently made, involving bribery more or less palpable, and in greater or less degree. Mr. Brice, in his *Treatise on Ultra Vires*, 8th ed., p. 317, speaks of such agreements as mere bribes, including in that class payments and agreements to buy off opposition, and having no other consideration. These, he says, are void, however disguised, and whether made with private individuals or with members of the Legislature.

In *The Scottish North-Eastern R. W. Co. v. Stewart*, 3 Macq. 408, Lord Cranworth said: "If the sum was agreed to be paid as a bribe to buy off opposition to the new bill, I think the agreement could not be sustained; it would have been an unwarrantable application of the funds of the company."

It seems to me that if the transaction had suggested to his Lordship's mind not only moral turpitude, which rendered the contract void in law and equity, but criminal liability also, he would have said something condemnatory of it in that aspect, as well as in the other, and used language of greater severity.

Mr. Brice proceeds, however, in the same strain, without suggestion of or reference to a violation of the criminal law: "But without taking the form of avowed bribes, arrangements savouring of this nature will be equally void. No matter what their conditions, what their apparent purpose, if in reality they are mere payments for no other

consideration than pure parliamentary interest and support, they will be void and not enforceable."

The leading case on the subject now is *The Earl of Shrewsbury v. North Staffordshire R. W. Co.*, L. R. 1 Eq. 593. Here the promoters of a railway company contracted with a land owner, being a peer of Parliament, to pay him £20,000, personally, for his countenance and support in obtaining the Act, such payment to be independent of the ordinary payment for land, severance, and other usual compensation. After the passing of the Act the directors of the company, when formed, ratified the contract, but having doubts whether under the Lands Clauses Consolidation Act, the land owner was entitled to the money personally, they covenanted by deed to pay interest upon the amount, which was to be paid by the company to the Earl or paid into Court. Kindersley, V. C., held that the original contract and the contract by the directors after the formation of the company, to pay a sum of money for countenance and support in prosecuting the Act, were *ultra vires*, and that they could not be enforced against the company as such, nor as payment of expenses of obtaining the Act, under the 65th section of the Companies Clauses Act, or otherwise.

A like point was involved in *Preston v. Liverpool R. W. Co.*, 5 H. L. Cas. 605, cited in *Green's Brice's Ultra Vires*, ed. 1880, pp. 317, 318.

In a note, at page 318, reference is made to a number of American cases, and it is remarked that, "There is a distinction between the services of a lobbyist, who works by secret personal influence, and those of an agent who appears before the Legislature, or a committee thereof, as a body, to exert an honest influence by the open statement of facts and arguments."

Connected with these matters is another consideration worthy of the most careful attention; that is, the difficulties met with and the obstacles to be surmounted by those to whom the government of a country is from time to time entrusted under a parliamentary constitution. Sometimes

driven to extremities in carrying out, or endeavouring to carry out, a policy which they believe to be suitable to the needs of the country, and therefore for its good, it is undeniable that they resort to means, often of a questionable character, considered *per se*, to secure the passage of their measures.

These considerations, with many others of a kindred character which might be suggested, probably account for the absence of a statute making the bribery of members of Parliament a criminal and indictable offence triable and punishable in the ordinary Courts of law. The difficulty is, doubtless, in drawing a line between what is necessary or permissible, and what ought to be criminal—the difficulty of drawing any line which may under no circumstances interfere with that free intercourse between members and the public which ought to and must exist. A further consideration with reference to such a line is the extreme difficulty, if not the impossibility, of preserving intact the privilege necessary to members of speaking and voting according to the dictates of their several judgments without any restraint except that of public opinion, and without feeling themselves accountable to any authority except that of their several constituents. Hence Parliament has kept the matter in its own hands, and instances are not wanting wherein it has meted out severe punishment for bribery and other offences against the law and privileges of Parliament.

Parliamentary privileges, like many other institutions of the English constitution which have grown out of the condition, habits, manners, and customs of the people, and been modified by varying circumstances, are indefinite in their nature, and enunciated as contained in general principles, sometimes vaguely expressed, and necessarily so, to secure that elasticity which renders them adaptable, under the direction of common sense, to new and varying conditions, and new or unusual combinations of circumstances.

This quality of elasticity is an essential character of the entire constitution, to which is attributed in a large measure

the superiority of an unwritten over a written constitution, and affords a strong reason why Parliament should assert its own privileges, and adjudge all matters concerning them, to the exclusion of all other tribunals.

The word "bribery" has in itself a vituperative meaning, in its common acceptation. The expression "to bribe a member" implies either that he is to be influenced or induced by improper means to do something either right or wrong, or indifferent; or by means otherwise of an innocent character to do something wrong. There is nothing in the giving of money by one person to another, considered as a bare act, or as an inducement to do what is not in itself wrong; but such an act is wrongful if done to induce the receiver to do wrong—to act contrary to his duty. The character of the object to be attained in the latter case, therefore, determines the character of the means and of the act, while in the former case the character of the means determines the character of the act.

Then it follows if one person pays money to induce another to do something the nature or character of which cannot be inquired of or examined, it is impossible to say whether that something is good or evil, right or wrong, legal or illegal; and bribery, therefore, in its vituperative sense cannot be predicated of it, because the payment of the money is an innocent act unless the object is improper.

Then, the presumption of law, and especially of criminal law, is, that the purpose or object is proper and legal, until the contrary is known; but a conspiracy to effect an object which is innocent and legal, by means not known to be improper, is not a conspiracy to bribe, nor is it illegal in the sense in which that term is used in the Courts of law.

It is undoubtedly an offence to bribe or attempt to bribe a public officer to do amiss, or leave undone anything in the discharge of his duty. But a member of Parliament is not a public officer. He is a legislator—is a representative immediately of a certain body of people limited to a certain portion of territory within the realm.

and indirectly of the realm. His duties are neither executive, nor administrative, but deliberative. His mission is to discuss, deliberate, and legislate. To do this properly his intercourse with his constituents and the public, in the most extensive sense of the term, must be free and unrestrained. He is therefore necessarily the sole judge of what he may hear and entertain, and how he may be persuaded, subject only to such limits and regulations as are imposed by the law and the usage of Parliament for the preservation of the honour of the member, and the dignity of Parliament; and herein the Courts are not permitted to interfere.

The very constitution of Parliament, its objects and its procedure, necessarily require that it be the sole judge of its own privileges, and this it has always assumed to be. Indeed that has never been disputed. The only disputes which have occurred between Parliament and the Courts at Westminster have had reference merely to the limits between the *lex et consuetudo parliamenti*, within which Parliament is sole judge, and the general law, common and statutory, within which the Courts had exclusive jurisdiction.

Mr. Stubbs, in his Constitutional History, vol. iii. p. 490, says: "That individual members should not be called to account for their behaviour in Parliament, or for words there spoken, by any authority external to the House in which the offence was given, seems to be the essential safeguard of freedom of debate."

Parliament is bound, however, by the law of the land, written and unwritten, of which the *lex et consuetudo parliamenti* is a distinct part; but the latter is a branch of law which applies only to Parliament and its procedure. The Courts, too, are bound by the law, and their action is limited to that portion of it which is outside the law and custom of Parliament. It has, however, sometimes been difficult to say whether a particular fact belonged to the one branch or the other.

But this matter is now so well understood that no dispute of the kind has arisen of late years. Long ago the House of Commons claimed the exclusive right, as a matter of parliamentary privilege, of dealing with all acts that occurred within the precincts thereof.

It was, however, settled afterwards, as early at least as in the reign of William and Mary, that there were three exceptions to that rule, namely, treason, felony, and breach of the peace, or refusing to give surety of the peace: *May's Parl. Hist.* (6th ed.) vol. ii., ch. 7, p. 3.

These exceptions appear to have been distinctly enunciated in *Thorp's Case*, in 1453, Rot. Parl. V. 239, in which the Judges laid down the doctrine that the privileges of Parliament comprehended all matters relating to or affecting Parliament and its procedure, except treason, felony, and surety of the peace, and with these exceptions Parliament had exclusive jurisdiction within its sphere. The privileges of members of the House of Commons were not then, however, nor for long afterwards, conceded to that extent by the House of Lords. The rule and exceptions were reiterated by Lord Ellenborough in *Burdett v. Abbott*, 14 East 128, and quite recently by the Court in *Bradlaugh v. Gossett*, 12 Q. B. D. 279.

The right to speak and vote in his place in Parliament is a member's privilege. He may exercise that privilege or not, and for refraining from using his privilege he is amenable to no law but that of Parliament.

Giving or offering money to a member to induce him to exercise or refrain from exercising his privilege to speak or vote, is not an offence within the scope of the criminal law; not at common law, for it preceded the Parliament as it has been known since it assumed definite shape with distinctive privileges, as the permanent, constitutional, advising legislative body of the kingdom; and not by statute, for no such statute is known. Yet it is certain that such a crime cannot exist, unless it has grown out of the proceedings of Parliament and passed from that into the cognizance of the Common Law.

“ On the 2nd May, 1695, it was resolved, (by the House of Commons): That the offer of any money, or other advantage, to any member of Parliament, for the promoting of any matter whatsoever, depending or to be transacted in Parliament, is a high crime and misdemeanor, and tends to the subversion of the English Constitution.”

And in the spirit of this resolution the offer of a bribe, in order to influence a member in any of the proceedings of the house, has been treated as a breach of privilege, being an insult not only to the member himself, but to the house:” *May’s Law and Usage of Parliament*, (9th ed.), p. 102; and he refers to the *Commons Journals* for that and other instances of the kind.

From this resolution the inference seems fairly to follow, that before then such bribery was not contrary, at least to the law and custom of Parliament, else the resolution would be unnecessary; and I think it may be accepted as a further consequence, that it could not have been known to the general law as a misdemeanor, for if it were a criminal offence outside of Parliament it must have been so inside, although cognizable inside by Parliament alone. For instance, it could at no time be necessary for Parliament, or either house thereof, to declare that assault committed within the walls of Parliament was a high crime and misdemeanor, because it was universally known to be a crime, an offence against the general law of the land. As such it was punishable by Parliament as a breach of its privileges, when the offence was committed within its precincts. But, inasmuch as it was a fundamental principle of the British Constitution that the Courts of law were the custodians of the peace of the realm, Parliament, without abandoning its own right to punish the offence as a breach of privilege, for the insult offered to the honour and dignity of Parliament, conceded to the Courts the right to punish the same offence as a breach of the criminal law, especially as it could not be presumed to have happened in the course of parliamentary proceedings.

The resolution of 1695 is a law to the House of Com-

mons only, and not to the Courts of law : it is not a law of the realm, because it is not a law of the Parliament.

Since then it does not appear that any statute has been passed either in Great Britain or this country making the bribery of a member a criminal offence.

A member is not a public officer, bound to the discharge of public duties, executive or ministerial. He is not a servant bound to discharge duties towards his master or employer. He is not an agent bound to the discharge of special duties towards his principal. If he were any of these, a person bribing or offering to bribe him to do what is contrary to his duty, or to omit the performance of it, would be punishable civilly or criminally, according to the nature of the offence. But a member is amenable only politically to his constituents, and to Parliament for the unfaithful use which he makes of his privileges, or for omitting to perform his functions as a member.

As a test of this instances are by no means wanting, besides those alluded to, of the bribery of members of the Commons. Not to speak of the instances of earlier days, it is a fact well attested by history that William III. bribed extensively. Sir Erskine May says : " To William III. fell the task of first working out the difficult problem of constitutional government ; and among his expedients for controlling his Parliaments was that of multiplication of offices. The country party at once perceived the danger with which their newly bought liberties were threatened, from this cause, and endeavoured to avert it.

In 1693 the Commons passed a bill to prohibit all members thereafter chosen from accepting any office under the Crown ; but the Lords rejected it. In the following year it was renewed, and agreed to by both Houses, when the king refused his assent to it." Parl. Hist. vol. i., ch. 6, p. 370.

In the reign of Anne and the Georges secret pensions were resorted to, so that Acts passed to restrain that sort of bribery could not reach it. Its influence was felt, nevertheless, though it could not be seen. In a debate on a bill

introduced to restrain this pernicious practice, Lord Halifax said secret pensions were the worst form of bribery. "A bribe," he said, "is given for a particular job : a pension is a constant continual bribe."

"Early in the reign of Geo. III. Mr. Rose Fuller, who had been a staunch Whig, was bought off by a secret pension of £500, which he enjoyed for many years. The cause of his apostacy was not discovered until after his death." *Ib.* pp. 371, 372.

Government in the times of Walpole and Grenville, and indeed during the whole of George the third's reign, was notoriously carried on by the means of bribery, if not by the immediate procurement, at least with the direct sanction or connivance of the king. Had it been a criminal offence, at common law, would such things have been done either openly or secretly? Would the King have been a party to criminal acts? Rather does not the history of such transactions tend to establish the conclusion, that the acts were regarded as merely of a political and not of a criminal character; and until the resolution of the House of Commons of 1695, the practice partook not even of the quality of a political offence punishable by Parliament. Political morality was at a low ebb, indeed, and sanctioned many things which would not now be tolerated. But an open systematic violation of the criminal law can hardly be presumed in such cases then more than now. If such practices were not criminal then, they could become so since only by statute; but there is no statute.

If the criminal law could have been invoked, the case of Sir John Trevor could hardly have escaped its cognizance. He—a Speaker of the House of Commons—in the reign of Wm. III., was voted guilty of a high crime and misdemeanour, and was finally expelled the House, for accepting a bribe of 1,000 guineas from the city of London, for aiding the passage of a local bill of theirs through Parliament: Lecky's 18th Century, vol. i., p. 396; Macaulay's Hist., vol. v., pp. 24, 25. Here the act was notorious; the bribers and the member bribed were known and within easy

reach ; the House of Commons was exasperated to the highest pitch ; yet no criminal prosecution took place, or was even spoken of ; nor do the historians express any astonishment thereat, or comment thereon. Would this occur if a law for the punishment of such an offence were known to exist ? Or, not existing, would not the absence of such a law on such occasions elicit comment, if it were not settled that though there were strong reasons for such a law, public policy was too potent to the contrary ?

It is stated, and commonly received as a general principle, that every act which is contrary to public morality, is contrary to public policy, and an offence punishable at the common law. Whether that statement is too broad or not I am not prepared nor is it now necessary to say, especially as it is usually found in the consideration of contracts, which have been impugned on that ground ; but while I do not deny the proposition as a definition of a class of misdemeanors, I must deny the implied universality of its being cognizable by the common law tribunals, and insist on an exception respecting the tribunal, when the offence occurs in connection with or with reference to parliamentary proceedings. In such cases Parliament long ago assumed and it possesses exclusive jurisdiction over the offence, and will not brook the interference of the ordinary Courts of justice. This exception regarding the tribunal seems to me to apply with full force to the present case.

In *Bradlaugh v. Gossett* Mr. Justice Stephen quotes Blackstone's maxim, "that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere": 1 Com. 163 ; and he proceeds to distinguish what arises concerning the house from what "is done within the walls of the house," to use Lord Denman's words: L. R. 12 Q. B. D. 279.

He therefore approves and adopts the general and very comprehensive term, "whatever matter arises concerning the house," and that it ought to be examined, discussed,

and adjudged in the house and not elsewhere. This is also consistent and even identical with the rule acted on in *Ex parte Wason*. In the latter, and in the present case, the matter of the alleged conspiracy concerned the house, had reference to proceedings therein. In this case, then, as in that, the rule applies.

Upon a retrospect of the whole case, and on consideration of the authorities, I am unable to distinguish it, in point of principle, from *Ex parte Wason*. The facts, it is true, are not identical, but they are sufficiently analogous to be controlled and disposed of judicially by the same principle. It must be borne in mind that in both cases the charge, when stripped of mere legal verbiage, is conspiracy. In the *Wason Case* the charge is not undue and improper interference with the course of justice, nor is it in this case bribery or attempt to bribe; but in both a conspiracy is charged; in the former case, to interfere with and influence the course of justice to the prejudice of an individual, by telling a wilful falsehood; in the present case a conspiracy to influence certain members of the Legislative Assembly to vote for a change in the administration of the day by the payment of money and the promise of office. The conspiracy alleged in *Ex parte Wason*, to hinder the course of justice, was and is *per se* a crime; and if it occurred elsewhere than in Parliament, or with reference to parliamentary proceedings, it would be indictable, and the Court would have granted the *mandamus* asked for, and the magistrate would have proceeded with the case. But it was a conspiracy to interfere with and hinder justice in one of the Houses of Parliament, and therefore the Courts of law could take no cognizance of it, and therefore the *mandamus* was refused most decisively, and in unmistakable language.

The Chief Baron, one of the three persons accused of conspiracy in that case, was not a member of the House of Lords, of which the other two were members, and therefore the conspiracy, if formed, was necessarily formed not in, but out of the House. It was a conspiracy to do

something afterwards in the House in the course of its proceedings. As soon as the agreement was made the conspiracy was complete, and the offence was committed; and if an indictment had then been found, and the parties put on their trial, before anything was done in pursuance of the conspiracy, what evidence would have been required to prove the charge? Simply that the conspiracy to make the statement alleged had been formed, and that the statement to be made was false, and that the conspirators knew it to be false. Nothing had been done in the House pursuant to the conspiracy, and therefore no question, no inquiry, would or could take place respecting anything done, nor would there be need of interfering with anything to be done in the House. The trial of the case in Court would, however, pertain or have reference to a matter which might take place in the House in the course of its proceedings, and in that way only could it be said that the proceedings in the House might be brought in question, and so the mere possibility of interference was held sufficient to debar the Courts from jurisdiction. The decision of the Court, formally stated, then was: No criminal charge, except treason, felony, or breach of the peace, can be entertained by the ordinary Courts of justice, if the charge in any way, even theoretically, though not practically, pertains or has reference to proceedings had, or that may be had in either House of Parliament; but Wason's complaint pertains or has reference to a matter which may happen in the proceedings of one of these Houses; therefore the complaint, though it formulates a charge which constitutes an offence or crime in law, is cognizable only by Parliament, and cannot be entertained by the ordinary Courts of criminal law.

The principle here expressed in the major premise appears to be well founded, and the minor is undoubtedly contained in it, so that the conclusion follows logically.

Using the same major in this case, there is in relation to it no difference between the minor of that and the minor premise of the present case, and then the same conclusion must follow.

In that view of the matter the means employed, or to be employed, for attaining the end for which the parties conspired, are immaterial; for the question is not, is there an offence, or have criminal proceedings been, or are they to be, employed, but have the ordinary Courts a right to interfere, or are such Courts ousted of jurisdiction by the privileges of Parliament?

As a test of the analogy between the two cases, assume in this case, as I assumed in *Wason's*, that the indictment was found immediately after the conspiracy was formed, and the accused parties were put upon their trial; what evidence would be required to sustain the indictment? Simply, that the conspiracy had been formed for the alleged purpose of influencing the members referred to, by the payment of money and the promise of office, to vote as the conspirators required.

The only difference between this and the *Wason Case* in that respect is, that in this case money and the promise of office were offered as an inducement to the members, while in the *Wason Case* the inducement does not appear, but was probably a desire, founded on friendship, to protect the Chief Baron from exposure and ruin. But, although the two members of the House do not appear to have been influenced by a bribe or the offer of a bribe, yet the conspiracy was to mislead and impose on the House itself by a falsehood, to prevent the course of justice. The object, the end proposed by the conspiracy alleged in that case, was to prevent justice; in the present case to procure a change of the administration. In that case, the very object to be attained was *per se* a crime, in this case it was not a crime; and admit that the means in this case was bribery, in the other it was falsehood. In this case, the end proposed, being a mere political one, is not illegal. The only possible question, then, remaining is, whether the means proposed by the conspiracy, to be used by the conspirators, to influence the members to vote for a purpose in itself perfectly legal, constituted an offence punishable by indictment, aside from the question of parliamentary

privilege. A vote of the kind mentioned merely expresses the opinion of each member who votes.

It can hardly be called a crime to give money to a member to strengthen his resolution to do that which he intends to do with or without that extraneous inducement; it therefore seems that it would be necessary to show in some way either that he was induced to change his resolution, or that having formed no resolution as to how he would vote on the particular subject, he was induced by the bribe to resolve to vote, or to pretend he would vote, as required; but if all that is necessary, the case presents insuperable difficulties for a Court of law. Then look at the case as presented by such inquiry with reference to the question of parliamentary privilege, and it is at once excluded from the Courts of law, for then the motives of the members would be directly called in question.

On the other hand, admit that it would not be necessary to inquire into the psychological states of members, their opinions or motives, would the offer or promise of money and of office as alleged, or of either, to induce the members to vote as required for the purpose alleged be *per se* an offence against the common law as administered by the ordinary Courts of Justice? I incline most reluctantly to the opinion that it would not, and if not a conspiracy to do it would not be in that sense criminal.

Analyse the two cases, and what are their elements? In the *Wason Case* the object of the conspiracy was in itself a crime. It is not so in this case; on the contrary, the object is an ordinary political one, and *per se* neither illegal or immoral. But is it criminal to pay a person, be he a member or not, money, for instance, to induce him to do that which is not only not criminal, but *per se* innocent?

Certainly, if it was not criminal, was not bribery in the criminal sense of that term, and it seems it was not, to pay the Earl of Shrewsbury, a peer of Parliament, £20,000, for his vote and influence in Parliament to assist the passage of a railway charter, or Act, through Parliament; if Sir John Trevor incurred no criminal liability by accepting

1,000 guineas from the corporation of the city of London for helping their bill through the House of Commons while he was not only a member but the Speaker thereof, and the managers of the corporation incurred no such liability by the payment, it could not nor can it be criminal in this to offer or promise to pay money to the members referred to, in order to influence or induce them to vote for a change of administration.

The end proposed was and is a political one, and is at all times the main object of the exertions of one party in Parliament.

I am, on a full consideration of the whole case, and the reasons thereof, led to the opinion that the indictment herein was conceived in mistake, which was the outcome of confounding two distinct and different positions held by different persons for different and incongruous objects; namely, confusing the position of a member of Parliament with that of a public officer.

But, aside from this question of confusion, the principle enunciated in *Ex parte Wason*, and adopted as the *ratio decidendi* therein, applies with equal if not greater force in this case, and leaves this Court, in my opinion, no alternative but to withhold its interference for want of jurisdiction.

The matters charged as an offence relate to a matter of parliamentary procedure; Parliament possesses exclusive jurisdiction over it, and will not brook the interference of the ordinary Courts of criminal law.

On first thought it seems outrageous and completely at variance with common sense that the Criminal Courts should not have jurisdiction in cases where public morality and decency are outraged by acts of venality and corruption, such as history informs us have invariably brought ruin and decay to every community, however great, in which they have obtained.

Acts of bribery, such as are alleged in the indictment in this case, whereby the minds of public men—the law-makers of the country—are debauched or attempted to be

debauched, are unquestionably outrages of public morality, degrading in their nature, contrary to public policy, and detrimental to the community; and one naturally expects them to be dealt with in the same manner and by the same tribunals as other offences of a like evil character. But reflection enables one to regard the matter in another light, and to approve. The interference of the ordinary Courts in such matters as the present might and probably would lead to evils greater than any which might be punished by the Courts. Such interference would certainly be an invasion of the independence of Parliament and of its members, to the possible and even probable detriment of the public good, and of public liberty. Besides, Parliament has the power to punish offenders in such cases, and not only its own members but all others also who offend by tampering with members, or acting otherwise contrary to or in derogation of the dignity of Parliament or the honour of its members.

Probably no severer punishment could be reasonably inflicted, no punishment that he would feel more, no punishment could be more deterrent to others, than that which Parliament justly meted out to Sir John Trevor; and it might, if so disposed, have inflicted suitable punishment on those who paid the bribe. Why the bribers in that case were not proceeded against we are not informed, and do not know, but doubtless prudential reasons to the contrary intervened and prevailed.

It appears to me, then, that this indictment is not warranted by the common law, nor by the statute law, nor by precedents of the criminal Courts, and that it is forbidden by that portion of the common law called *lex et consuetudo parliamenti*.

In my humble opinion, then, the demurrer ought to be allowed, and the order *nisi* to quash be made absolute.

Demurrer overruled, and judgment for the Crown.

[QUEEN'S BENCH DIVISION.]

DONNELLY V. HALL.

Sheriff—False return—Chattel mortgage—Description in—Liability of sheriff.

In an action against a sheriff for false return the defence was that the goods seized and subsequently, on his being indemnified, abandoned by him, and which were on Bald Lake, Buckhorn Lake, Sandy Creek, and Squaw River, were covered by a chattel mortgage to a Bank, the goods in which mortgage were described as being "now in and upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scugog River, and the shore adjacent thereto." The evidence shewed that the former waters were well known as such, and as distinct from and forming no part of the latter, and that no part of the goods seized had ever been "in and upon" the latter: *Held*, that the words in the mortgage, "now in and upon," expressly limited the goods to which they referred to those goods which were then upon the waters mentioned in the mortgage, and the shore adjacent thereto, and could not include the goods seized.

Where a sheriff, having seized goods of sufficient value to satisfy the plaintiff's execution, abandons them on being indemnified he should not get the benefit of any doubt which may be raised as to their realizing enough if sold.

ACTION against the defendant, sheriff of the county of Peterborough for a false return of *nulla bona* to a writ of *feri facias* goods, directed and delivered to him for the having satisfaction of a certain judgment theretofore recovered by the plaintiff against Thomas W. Robinson and James Elliott in this Court, for the sum of \$570, and \$31.41 costs.

The defence set up was, that by reason of there being in the hands of the said sheriff other writs of *feri facias* against the goods of the said Robinson and Elliott having priority over the plaintiff's writ and by reason of Robinson and Elliott having prior to the placing of the plaintiff's writ in the sheriff's hands executed to the Ontario Bank a bill of sale by way of mortgage on their goods, the said Robinson and Elliott were not possessed of any goods in the defendant's county, out of which he could have made the amount of the plaintiff's writ, and that the return of *nulla bona* to the said writ was true in substance.

The cause was tried at the last Fall Assizes at Peterborough by Galt, J., without a jury.

It appeared that the plaintiff's writ was placed in the sheriff's hands on the 4th day of September, 1882, and that at that time there were in the sheriff's hands the following executions prior to the plaintiff's execution:

Lightbound, Rolston & Co...	\$ 5035 80
Do. do.	9054 81
Clegg	428 93
J. G. Edwards	294 71
Bank of Toronto	3006 28
J. P. Davis	3382 42
	<hr/>
	\$21202 95

In respect of these executions there was made out of a sale of Robinson & Elliott's goods other than those covered by the chattel mortgage hereafter mentioned, and seized by the sheriff as hereafter mentioned, the sum of \$10,960.43 which by some arrangement between these execution creditors was divided between them, and the book debts of Robinson & Elliott, amounting to between \$14,000 and \$15,000, were assigned to Lightbound Rolston & Co., and the result was, that the amount of the said executions, other than Lightbound Rolston & Co.'s, was reduced to \$1,200 or \$1,300, and Lightbound Rolston & Co.'s to \$586.93, thus leaving \$1,787 or \$1,887 prior to the plaintiff's execution.

After the plaintiff's execution was placed in the sheriff's hands, the sheriff seized goods of Robinson & Elliott, consisting of wood, cordwood, posts, ties, telegraph poles, lumber, shingles, shingle bolts, logs, and tanbark, in and upon Bald Lake, Buckhorn Lake, Sandy Creek, and Squaw River, estimated by the sheriff, and by his bailiff who seized them, to be worth \$4000. This seizure the sheriff abandoned at the request of the Ontario Bank, being indemnified by them for so doing. The Ontario Bank held a chattel mortgage upon certain of Robinson & Elliott's goods, described as follows: "All and singular the

goods, chattels and effects hereinafter particularly mentioned and described, namely, all their basswood lumber piled at Kelly's mill, Bridgenorth, being one hundred thousand feet; and all the basswood lumber piled at Petrie's mill, Bobcaygeon, being about one hundred thousand feet; all the pine, cedar, oak, elm, hemlock, ash, tamarac, and other timber of the said parties of the first part, which is now in and upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scugog River, and the shore adjacent thereto, different portions of the said timber being marked with one or other of the following marks: "W" "T" "E" "5" "D₂" "D₁" and which said timber consists of about twenty-five thousand pieces of round tie cedar, about fifteen thousand pieces of round tie hemlock, about thirty-two thousand pieces of cedar posts, about two thousand pieces of cedar timber, about seven hundred telegraph poles, about two thousand pieces of hardwood saw logs, about ten thousand pieces of pine saw logs, about three thousand five hundred pieces of basswood saw logs, about fifteen thousand pieces of hemlock saw logs, about twenty-two hundred pieces of cedar saw logs, about twenty-two hundred pieces of loose timber, about five hundred pieces of round tie tamarac, about five thousand five hundred feet of square timber, about two hundred cords of tanbark, about three thousand cords of hard and soft firewood, besides quantities of ash, elm, and oak timber, and stave bolts; also the following plant, namely: one large brown bobtail mare, one large chestnut mare, one large roan horse, two large chestnut horses, one large black horse, one large brown horse, one large bay horse, one average sized black mare, one average sized brown mare, two small bay horses, one portable steam engine, one sawing machine, two wood scows, three wagons, four sleighs, a quantity of boom chains, together with all other plant used by said parties of the first part in and about the business of lumbering heretofore conducted by them." This mortgage was made by Robinson & Elliott, parties of the first part, to the Ontario Bank, on the 5th day of August, 1882.

On August 19th, 1882, the manager of the Ontario Bank wrote the following letter:

T. LUDGATE, Esq., Peterborough.

DEAR SIR.—Please take possession of the logs, wood, ties, timber, lumber, plant, horses, &c., &c., as shewn in accompanying copy of chattel mortgage executed by James Elliott and T. W. Robinson to the Ontario Bank, and hold the same for the bank until further instructed, also make an inventory of same, giving quantities, condition, &c., and report to me as soon as possible, and this will be your instructions for so doing."

Ludgate was called as a witness, and gave an account in detail of what he did under these instructions.

The evidence shewed that Ball Lake, Buckhorn Lake, Sandy Creek, and Squaw River were well known as such, and were known to be distinct from and to form no part of "the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scugog River:" that Sandy Creek flowed into Buckhorn Lake: that the waters of Ball Lake flowed through a narrow channel variously estimated to be from one to two miles long to Pigeon Lake, and that Squaw River flowed into this channel and thence into Pigeon Lake: that no part of the goods seized by the sheriff had ever been "in and upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scugog River and the shores adjacent thereto."

The defendant swore that he thought at the time that but for the interference of the Ontario Bank he would have made enough money to have satisfied the plaintiff's execution.

The learned Judge found that the mortgage held by the bank did not cover the property seized by the sheriff. He also found from the defendant's own evidence that but for the action of the bank he would have made the money on the plaintiff's execution, and he directed judgment for the plaintiff for \$675 and costs.

On December 8, 1884, *Osler*, Q.C., *Poussette* with him, moved to set aside and reverse the said judgment, and to dismiss the action, with costs.

Hudspeth, Q. C., showed cause.

The goods seized being timber, ties, logs, &c., on Ball Lake, Squaw River, Buckhorn Lake and Sandy Creek, being lakes and streams not mentioned in the chattel mortgage, Squaw River flowing into Ball Lake which flows by a narrow sluggish stream into Pigeon Lake, and Sandy Creek flowing into Buckhorn Lake, both being as distinctive from Pigeon Lake as Pigeon Lake is from Mud Lake and well known marked and defined as such.

There is no evidence that any of the goods seized were marked with the marks mentioned in the chattel mortgage

Goods like these cannot be identified except by location, and the Ontario Bank has identified the goods covered by the chattel mortgage by locality. It might as well be argued that wheat, barley, and oats, described as in certain granaries in the townships of Otonabee and Harvey, covered a granary full of the same kind of grain in the township of Ennismore.

The Ontario Bank never took possession of these goods seized by the sheriff. Ludgate was instructed to take possession of the goods covered by the chattel mortgage, which he did by going to Pigeon Lake, and putting a man in charge of it. Afterwards he went to Ball Lake and looked at the stuff there, and this was all he did. He did not leave any one in possession, or even make an inventory of it. As to the sufficiency of the goods to reach plaintiff's execution, the defendant swore at the trial that in his opinion the goods seized were worth \$4000, and that he had no doubt that but for the interference of the Ontario Bank by indemnifying him to return the writ *nulla bona*, he could have satisfied the plaintiff's claim in full out of the goods seized. The shorthand writer has not taken down the sheriff's evidence as he gave it, but this was the gist of it: *Hobbs v. Hall*, 14 C. P. 479. Besides, the evidence of value was merely the opinion of persons, and Ludgate only valued firewood at 40 cents a cord, while Fletcher valued it at \$1.60 to \$1.75. He values the stuff

in Ball Lake and Squaw River at \$2,500, and less if sold at sheriff's sale. This does not include the stuff in Buckhorn Lake and Sandy Creek.

The defendant is bound by his own valuation, and being a wrongdoer the Court should not be too careful in weighing the evidence of value.

The verdict is supported by the evidence, and should stand.

January 6, 1885. ARMOUR J.—The defendant raised three contentions: first, that the goods seized by the sheriff were covered by the mortgage to the Ontario Bank; second, that the said goods were given by Robinson & Elliott to the bank as security for their debt, and were taken possession of by the bank before the plaintiff's writ was placed in the sheriff's hands; and third, that the goods seized would not have realized enough after paying what was due in respect of the prior executions to pay anything on account of the plaintiff's execution.

As to the first contention, I think that the words in the mortgage, "now in and upon," expressly limit the goods to which they refer to these goods which were then upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Scugog River and the shore adjacent thereto, and cannot include the goods seized, which were upon Ball Lake, Buckhorn Lake, Sandy Creek, and Squaw River, the waters of these lakes and of this creek and river being separate and distinct waters and being universally recognized as such in that locality. The Scugog River, Sturgeon Lake, Pigeon Lake, Buckhorn Lake, and Mud Lake have all received legislative recognition as such in Consol. Stat. C. cap. 28, schedule A., and no one in that locality would understand any one speaking of Pigeon Lake to mean or to indicate within that designation the waters of Ball Lake.

The second contention is disposed of by the evidence, there being no pretence for saying upon the evidence that any conveyance was made, or any possession given by

Robinson & Elliott to the bank of any goods except in and by the mortgage. Ludgate was only authorized by the bank to take possession of the goods shewn in the mortgage, and if what he did could be called taking possession of the goods seized it was unauthorized, but even if authorized it could have no effect to transfer the property in those goods to the bank.

As to the third contention, I do not think, in a case where a sheriff has taken an indemnity against the consequences of his agreeing not to do his duty, by which a plaintiff has been deprived of the benefit of having a defendant's goods sold, and of protecting his own interests upon such sale, that we ought to give the sheriff the benefit of any doubt that may be afterwards raised about the goods, if sold, realizing enough to pay the sheriff's execution. It ought to be sufficient for us to know that he had seized, and afterwards, at the instance of a person who indemnified him for so doing, abandoned, contrary to his plain duty, goods of a value sufficient to have paid the sheriff's execution.

The weight of evidence seems to me to entirely justify the finding of the learned Judge. The defendant and his bailiff, who seized the goods, both concurred in estimating their value at \$4,000. Fletcher, who was foreman for Robinson & Elliott in getting out the goods seized upon Bald Lake and Squaw River, put the value of those goods at \$2 500, and this valuation did not include the goods seized upon Buckhorn Lake and Sandy Creek. The only other witnesses as to value were Cochrane and Ludgate, neither of whom estimated the value of the goods seized in detail.

The bailiff who seized the goods made a return in detail of all the goods so seized, and taking the prices of the goods given by Ludgate and applying these prices to the goods so seized, I find that the estimate of the sheriff of the value of the goods was not excessive, and I agree in his opinion, that but for the interference of the bank he

could have made enough money out of the goods seized to have satisfied the plaintiff's execution.

The motion ought therefore to be dismissed, with costs.

WILSON, C. J., and O'CONNOR, J., concurred.

Motion dismissed, with costs.

[CHANCERY DIVISION.]

THOMAS V. INGLIS ET AL.

Fixtures—Property in chattels affixed not to pass—Intention—Injunction.

T. being liquidator of a company which was being wound up sold the manufactory to H. for \$9000, part in cash and the balance secured by a mortgage on the premises. At the time of the sale there was an engine, boiler, pulleys, &c., among the machinery on the premises, but no mention of them was made in the mortgage. H. afterwards undertook to sell the engine, boiler, and pulleys, but T. objected until assured that they would be replaced by better machinery. H. purchased from I. and H. the defendants another engine, boiler, shafting, hangers, and pulleys to replace the old ones, paying part in cash, and securing the balance by notes, under a written agreement, which stipulated that the property should not pass to H., but was to remain in I. and H. until the full payment of the price, and of any obligations given therefor, but I. was to have possession at once, and to use the same until default in payment * * when I. and H. might resume possession. The engine and boiler were placed upon a stone foundation and bricked over in a building on the premises other than that from which the old ones had been removed. They could be removed by taking down a part of the wall of the building in which they were placed, and without injury to the old building; but were so affixed to the realty as under ordinary circumstances to become a part of it. H. failed, assigned his estate for the benefit of his creditors, and made default in payment, and I. and H. began to remove the machinery.

In an action brought by T. for an injunction restraining the defendants I. and H. from such removal.

Held, that the express agreement between H. and the defendants, that the property in the machinery should not pass from the defendants to H. until paid for, and the intention with which the articles were affixed, must govern: and that the machinery therefore did not become part of the realty or pass to the plaintiffs.

THIS was a motion for an injunction made by William Thomas against John Inglis and Daniel Hunter, to restrain the removal of certain machinery, which motion was, by

consent of counsel for all parties, turned into a motion for judgment.

The motion was argued on December 12, 1884, before Proudfoot, J.

The evidence went to shew that the plaintiff was the liquidator of the Electric and Hardware Co., which was being wound up, and that, as such liquidator, he had sold the manufacturing premises of that company to one Thomas W. Hollway for \$9,000, part of which he had received in cash, and the balance was secured by a mortgage on the premises. At the time he sold and took the mortgage there was an engine, boiler, pulleys, and shafting, on the premises; but no mention was made of any machinery in the mortgage.

After Hollway took possession he sold the old engine and boiler, and purchased new ones, with some hangers and pulleys from the defendants; but when about to remove the old ones both the liquidator and the plaintiff in the suit against the company for liquidation, who was a solicitor, objected; and it was only upon the assurance that they were to be replaced by better ones, that the removal was allowed to take place.

The terms on which the purchase from the defendants was made are fully set out in the letters and agreements recited in the judgment of the learned Judge.

The new engine and boiler were put in and were set upon a stone foundation and bricked over, in a different building from the one from which the old ones were removed, and in such a manner that they could be removed by taking down a part of the wall of the building in which they were placed, and without injury to the building that was on the premises when Hollway purchased; but (as found by the learned Judge) they were so affixed to the realty as in ordinary circumstances to become a part of it, and to pass by a conveyance of it.

The evidence further shewed that the new hangers and pulleys were bolted to joists, but could be removed without injury to the building, if done carefully.

The evidence as to the value of the premises was somewhat conflicting, some of the witnesses testifying that if they were sold without the machinery they would not realize enough to pay off the plaintiff's mortgage, while others testified to a value largely in excess of the amount due the plaintiff.

The learned Judge found on this point that the security for the plaintiff's mortgage would be ample without the machinery.

The question to be tried was, whether in view of the terms of the purchase from the defendants the peculiar character of the agreements entered into between Hollwey and the defendants, the stipulations for the sellers retaining the right of property in the articles until paid for, and the power to resume possession and enter and remove them, the defendants had the right, upon Hollwey having made default in the terms of payment, and having made an assignment for the benefit of his creditors, to enter the premises and remove the machinery.

Tilt, Q. C., with him *Mulock*. The boiler, engine, shafting and pulleys are fixtures from the way in which they were bricked in and attached to the freehold: *Holland v. Hodgson*, L. R. 7 C. P. 328; *Brown's Law of Fixtures*, 4th ed., 71; *London and Canadian Loan, &c., Co. v. Pulford*, 8 P. R. 150; *Dickson v. Hunter*, 29 Gr. 86.; *McCausland v. McCallum*, 3 O. R. 305. The agreements under which the purchases were made were nothing more than hire receipts, and when the chattels are attached to the freehold, as in this case, with a knowledge of the mortgage on the freehold, they become part of the freehold and cannot be removed: *Oates v. Cameron*, 7 U. C. R. 228. The payments not having been made according to the terms of the hire receipt, and further time having been given therefor, the defendants waived their right to take possession of the machinery.

The evidence shews that the hangers and pulleys were attached to the premises before the agreement with respect

to them was entered into, and that when default was made in the payment the defendants did not enforce their forfeiture, in fact they waived it: *Addison* on Contracts, 6th ed., 331, nothing has accrued due since. The mortgage carries the machinery, and covers fixtures added after the mortgage was made: *Meux v. Jacobs*, L. R. 7 H. L. 481; *Brown's Law of Fixtures*, 4th ed., 118, 140; *Ewell* on Fixtures, 21. It makes no difference what the value of the property is, the defendants cannot remove the machinery: *Gordon v. Johnson*, 14 Gr. 403. The plaintiff would have prevented the removal of the old engine only that he was not aware of the exact time when it was taken away. Hollwey had no authority to make any agreement on the subject. A mortgagor has no right to remove any part of the freehold or to alter the security: *Gordon v. Johnson*, 14 Gr. 403; *Russ v. Mills*, 7 Gr. 145. The evidence shows that the security is not sufficient if the machinery is removed. The defendants knew the risk they ran if they put the machinery in.

McCarthy, Q.C., with him *Creelman*, for the defendants. The plaintiff has no merits. The premises are ample security to him without the machinery and Hollwey has greatly improved them irrespective of the machinery. The plaintiff is a mortgagee not in possession, and there is nothing due on his mortgage. The property in the machinery belonged to the defendants as between them and Hollwey. How have they lost it? It must be shewn that they stood by, and allowed something to be done. The machinery is in a separate building, and rests on a foundation: *Walker v. Hyman*, 1 A. R. 345. The doctrine that attaching anything to the freehold makes it a fixture is exploded: *Keefer v. Merrill*, 6 A. R. 121. The intention of the parties must govern. If Hollwey cannot claim it, how can the plaintiff claim it unless as assignee of Hollwey? The rule as to fixtures will not be extended so as to do an injustice: *Wake v. Hall*, 8 App. Cas. 195. This case is the same in principle as *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382. I also refer to *London and*

Canadian Loan, &c. Co. v. Pulford, 8 P. R. at p. 153. It was held in *Rose v. Hope*, 22 C. P. 482, that the owner of land upon which there are fixtures, such as machinery in a mill, has the right to sever the chattels from the realty. In the case of logs converted into lumber and shingles the property is not changed: *London, &c., Co. v. Drake*, 6 C. B. N. S. 798. The property has not changed here: *Forristal v. McDonald*, 9 S. C. R. 12. The mortgagee allowed the machinery to be put upon the premises where it was only hired. The only relief asked is an injunction.

Tilt, Q. C., in reply. In *Rose v. Hope*, *supra*, the chattel mortgage was made prior to the mortgage on the realty. I refer also to *Dewar v. Mallory*, 26 Gr. 618, 27 Gr. 303. *The Hinckley and Egery, &c. Co. v. Black*, referred to in *Amos & Ferard on Fixtures*, 3rd ed., 282, as at 35 Am. R. 346, and *Fryatt v. The Sullivan Company*, 5 Hill N. Y. Rep. 116, also there cited.

January 2, 1885. PROUDFOOT, J.—This action is brought by the liquidator of the Electric and Hardware Company to restrain the defendants from removing an engine and boiler, and shafting hangers and pulleys, from certain mortgaged premises.

The plaintiff sold the premises to one Hollwey in March, 1883, which had been used for silver plating, and on which were a boiler and engine. The price was \$9,500. For part of the purchase money, \$8,300, Hollwey gave a mortgage to the plaintiff, which describes the premises by metes and bounds, but says nothing as to the machinery, &c. There is now due on the mortgage, \$7,000.

Hollwey intended to use the building for a manufactory of furniture, and found the engine not powerful enough, and he sold the engine and boiler for \$350, and the shafting for \$200 odd. Thomas says he objected to their removal, but allowed it on the assurance that better machinery would replace it.

Hollwey treated with the defendants for a new Corliss engine and boiler. They made him an offer on the 29th

March, to furnish boiler and engine (specifying the articles to go with them) "all set up complete, in good running order in your factory in Toronto, for \$2,050. Terms, one-third cash when the machinery is ready to put in, the balance by note at six months, renewable twice for three months each renewal, on payment of not less than \$350 at such renewals. The *possession* of machinery not to pass from us until all payments are made; you to build in boiler and foundation for engine, and provide for entrance way for machinery."

On the 30th March Hollway wrote to the defendants accepting their tender for Corliss engine in their letter of 29th March

On the 2nd June, 1883, a formal agreement was signed by Hollway and by Inglis & Hunter for the sale to Hollway of the Corliss engine, tubular boiler and connections marked and numbered as per invoice thereto annexed, for \$2050, payable one-third cash, balance by note at six months, renewable twice for three months each time on payment of not less than \$350, at each time of renewal. The agreement contained the following stipulation: "And it is hereby agreed between the parties, that the property in the said Corliss engine, tubular boiler and connections is not to pass to the said Thomas W. Hollway, but is to remain in the said Inglis & Hunter until the full payment of the price and of any obligations given therefor or any part thereof; but the said Thomas W. Hollway to have possession at once, and to use the same until any default made in the payment of the price or any obligations given therefor, when the said Inglis & Hunter may resume possession."

On the 1st September, 1883, another agreement was executed by these parties for the sale and purchase of shafting, hangers, and pulleys, for \$386.90, which contained a similar clause as to the property not passing to Hollway till payment &c.

On the 4th February, 1884, a further agreement was signed by these parties, which was not to annul or super-

sede these agreements, and which does not seem to differ from them in effect except that it gave Inglis & Hunter liberty at any time during the day to enter upon the premises where the machinery was, and to break and force open any doors, locks, or other fastenings for the purpose of taking possession of or removing the said machinery, with all the powers possessed by a sheriff executing a writ of possession.

The machinery above mentioned was delivered under the agreements of 2nd of June and 1st September. The engine and boiler were not put in the place that had been occupied by those that were removed, but placed in a building built by Hollwey adjoining the manufactory. They can be removed by taking down a part of this building without injury to the building on the place when sold to Hollwey; but I think it is the proper result of the evidence that they were so affixed to the realty as in ordinary circumstances to become a part of it, and to pass by a conveyance of it.

The question in this case, however, is, whether the peculiar character of the agreements, the stipulation for the sellers retaining the right of property till paid, and the power to resume possession and to enter and remove the machinery, do not qualify the general rule that *quicquid plantatur solo, solo cedit*. *Brown's Law of Fixtures*, 3rd ed., ss. 78, 79, 4th ed., p. 60, treats the case of a mortgagor in possession as that in which the right of removal of fixtures is smallest, and cites a number of American cases—*Clary v. Owen*, 15 Gray 522 (1860); *Lynde v. Rowe*, 12 Allen 100 (1866); *Hunt v. Bay State Co.*, 97 Mass. 279 (1867)—as establishing that if after the execution of a mortgage of real estate fixtures are annexed by a tenant of the mortgagor, the tenant's right to remove them is no higher as against the mortgagee than that of his landlord, the mortgagor, would have been, supposing the mortgagor had been the person who erected them. And that in *Clary v. Owen*, it was decided that the fact of a special contract with the mortgagor for removal, and the further fact of

the sale of the equity of redemption to the transferee of the mortgage, who had notice of the tenant's claim, did not make the fixtures any the more removable. In a subsequent section (158) he refers to cases in which the right of the mortgagee was partially modified by some written agreement, and (158a) cites four American cases which have considerable resemblance to the present.

Ford v. Cobb, 20 N. Y. 344 (1859) was an action to recover damages for an alleged illegal entering upon the plaintiff's premises and the removal and conversion of twenty-three salt kettles. These had been bought of the defendant by the owner of the salt works, and were set in arches in such manner as that they could not be removed except by tearing off a portion of the upper bricks of the arch, and prying the kettles out by a plank and bars. But it was proved to be a general custom in the salt trade to take the kettles out of their arches and to re-set them every season; and this custom had been followed in the case of the kettles in question every season. The owner of the works mortgaged the kettles to the defendant by bill of sale duly filed and re-filed to secure the due payment of certain promissory notes made by the owner of the works to the defendant for the amount of the price of the kettles. Subsequently the owner of the works sold them to the plaintiff, who had no notice of the defendant's mortgage of the kettles. Afterwards, the promissory notes not having been met when due, the defendant seized the kettles. The Court held that the kettles remained personalty as against the plaintiff purchaser of the salt works, and belonged to the defendant under his mortgage. The Court admitted that if the kettles had been paid for when purchased, instead of being mortgaged for the price, the manner in which they were annexed to the freehold was such as would have converted them into parcel of the realty, in which case they would have passed to the plaintiff as subsequent purchaser and grantee of the land. But it was agreed in the bill of sale that notwithstanding their annexation to the freehold in the manner contemplated,

they should continue personal property, so as to give effect to the personal mortgage. And such an agreement is perfectly possible in respect of articles which are in their nature removable, if in their removal they are not wholly injured and destroyed, notwithstanding that they may be parcel of the realty to which they are annexed.

So in *Sheldon v. Edwards*, 35 N. Y. 279 (1866), it was held that certain machinery, purchased from the manufacturer and mortgaged to the manufacturer, who was also mortgagee of the land on which the machinery was set up, had been so treated by the parties to that mortgage as to remain, notwithstanding their close annexation with the freehold, purely personal chattels, and therefore passed to the defendant, who was the transferee of the chattel mortgage and also assignee of the equity of redemption therein, as against the plaintiff, who was the transferee of the mortgage on the land itself.

In like manner in *Godard v. Gould*, 14 Barb. 662 (1853) by a written contract entered into between the plaintiffs, who were manufacturing engineers, and a mill owner, it was agreed that the plaintiffs should manufacture for the mill owner certain machinery, and should also set it up in the mill, the plaintiffs to remain owners of the machinery until it was paid for. The mill owner afterwards mortgaged the mill premises with the machinery to the defendants. It was held that the plaintiff's title to the machinery remained as against the defendants so long as the machinery was not paid for, and that this was the result of the personal agreement between the plaintiffs and the mill owner. Brown says the annexation in this case was such as to admit of ready removal of the machinery without injury to the mill. Had the annexation been of different character, the result would probably have been different, assuming that the mortgagee of the land had no notice of the claim of the unpaid vendors of the machinery.

For this last proposition the case of *Davenport v. Shants*, 43 Vermont 546 (1871) is cited, where the defendant sold machinery under a condition that it should remain the

property of the vendor until the price was paid. Part of the machinery was annexed so as to pass under a mortgage of the mill as real estate, and the owner afterwards mortgaged the mill and machinery to the plaintiff, who had no notice of the defendant's claim. It was held that the claim of the mortgagee without notice was paramount to the equity of the unpaid vendor.

Cases to the contrary of the first three may be found in plenty in the American Courts, of which *Fryatt v. The Sulzivan Co.*, 5 Hill N. Y. 116, is an instance. No case was cited nor have I found any in the English books where the question arose upon an agreement such as existed here. But there are many cases that shew that the mere affixing to the freehold does not determine whether the articles become real estate or remain personal chattels. The nature of the interest of the person affixing them, and the intention with which they were affixed, are of material importance in ascertaining whether they have been converted into real estate or not. The same rule does not apply to a lessee for years, a tenant for life, and an owner in fee; nor where the articles are put up for a trade, or for the improvement of the inheritance. The guiding principle seems to be with what intention was the affixing of the articles done, and if the person affixing them has only a special property in them he cannot affix them so as to affect the rights of others. As, for instance, where a tenant for life was entitled to the use of certain chattels during his estate, he could not by attaching them to the freehold turn personal chattels into real estate and thereby affect the rights of his successors: *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382, 394.

The recent case of *Wake v. Hall*, 8 App. Cas. 195, has defined the application of the maxim, *quicquid plantatur solo, solo cedit*, and placed upon it a more limited construction than many of the prior cases had done. In that case miners working under certain customs lawfully erected machinery and buildings accessory thereto on surface land, of which the miners were entitled to the exclusive use for mining purposes, but the freehold of which belonged to

others. The buildings were attached so as to be part of the soil, and so that they could not be removed without some disturbance, which would not amount to a destruction of the soil. The buildings were from the first intended to be accessory to the mining, and there was nothing to shew that the property in them was intended to be irrevocably annexed to the soil. It was held that the miners were entitled to pull down and remove the buildings while their interest in the mine continued, and were not liable to the surface owners for so doing. Lord Blackburn, at p. 202, states the point for decision thus: "The question, therefore, which has to be decided is, whether when the defendants erected buildings so no doubt as to annex them to the soil of the plaintiffs, but, in the language of the third admission, 'for mining purposes,' and that at a time when the defendants had a right to erect such buildings on the plaintiff's soil, they, whatever their intention might be, made the materials the property of the owners of the soil in such a sense that the defendants could not at any time remove them."

And after stating that no case had ever been decided on that particular kind of interest, he proceeds to examine the rule, *quicquid plantatur solo, &c.* He quotes it from Gaius as found in the Dig. liber 41, title 1, l. 7, s. 10, and translates it as follows: "If one on his own land has erected a building with materials belonging to another, he is the owner of the building, for all that is built into the soil becomes part of it, '*quia omne quod inædificatur solo cedit.*' But this is not so that he who was the owner of the materials ceases to be the owner thereof; but, nevertheless, he (the owner of the materials) cannot bring an action to recover them in specie, nor take them away himself ('*nec vindicare eam potest neque ad exhibendum de ea agere*'), because of that law of the twelve tables which provides '*ne quis tignum alienum aedibus suis junctum, eximere cogatur sed duplum pro eo praestet.*' Therefore, if by any cause the building is cast down, the owner of the materials can '*nunc eam vindicare et ad exhibendum*

agere.' So far from meaning by the maxim that the property which had existed in the materials whilst chattels was lost, and vested in the owner of the soil, the maxim is used when Gaius, and the framers of the digest who adopted his opinion, thought that the property in the materials remained in the person who was the owner of them whilst chattels, and did not vest in the owner of the building, though by the annexation the materials had become part of the soil, and though by the positive law of the twelve tables he was obliged to leave the building untouched on being paid double the value of his materials."

I may mention that the text of Gaius has also been transferred by Justinian to the Institutes, Lib. 2, Tit. 1, No. 29. The translation by Lord Blackburn of the phrase '*neque ad exhibendum de ea agere*' is erroneous, but it does not affect the general scope of the law.

Lord Blackburn proceeds to shew the importance of the intention with which the chattels are affixed. Even where the owner of the inheritance has annexed chattels of his own to the land, he does not always cause the property in the chattels to cease to be personalty.

Whenever the chattels have been annexed to the land for the better enjoying the land itself, the intention must clearly be presumed to be to annex the property in the chattels to the property in the land, but the nature of the annexation may be such as to shew that the intention was to annex them only temporarily. But even in such a case the degree and nature of the annexation is an important element for consideration. If it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was to be annexed in perpetuity to the land.

In the case before him, where it was not intended that the buildings should be accessory to the soil: and though the foundations being below the natural surface, they could not be removed without some disturbance to the soil, it was not so great as to amount to a destruction of the land, or to shew that the property in the mate-

rials must have been intended to be irrevocably annexed to the soil.

There are cases in our own Courts which also shew that intention governs. Those cases in which the owner has made a chattel mortgage of the fixtures establish this. The owner of the soil upon which there are fixtures has the right to sever them from the freehold, and a mortgage by him upon the fixtures will not be prejudiced by a subsequent mortgage of the land: *Rose v. Hope*, 22 C. P. 482. And it can make no difference whether this intention be expressed by making the mortgage of the chattels before mortgaging the land, or if the land be mortgaged by expressing it when the chattels are subsequently affixed.

The unreported case of *Barter v. McLaughlin*, in the Queen's Bench, in February, 1878, is decisive of the case before me. That was an action of detinue for a middlings purifier, sold by the plaintiff to Henry John Boulton, tenant of a mill for \$500, under an agreement that the machine should remain the property of the plaintiff till paid for. H. J. Boulton paid \$350 on account of the machine, and then his tenancy ceased, and George D'Arcy Boulton, the owner of the property, sold the mill, its fixtures and contents, for \$14,005 to the defendants, and the defendants were ignorant of the agreement with the plaintiff. The machine was so affixed as to become annexed to the realty, and in ordinary circumstances to pass with a deed of the land. A verdict was given for the defendants. But a rule was made absolute to enter a verdict for the plaintiff. The *ratio decidendi* as I have been informed by some of the learned Judges who took part in the decision, was, that the property remained in the plaintiff, and that the owner of the land could pass no greater title than the tenant who had purchased the machine. It is to be noticed also that the plaintiff sold his machine on the 19th October, 1875, and put it up in the mill. Henry John Boulton's tenancy ceased in June, 1876, and the sale by George D'Arcy Boulton to the defendants took place on the 16th December, 1876, and the deed to them was registered on the 16th March, 1877. The

action was begun 21st June, 1877. So that the decision is much stronger than is required for the case before me.

Many cases on the subject of fixtures may be found collected in the judgments in *Phillips v. Grand River, &c., Ins. Co.*, 46 U. C. R. 334, but those to which I have referred above seem to me sufficient for the disposal of this case.

In the English cases the intention that the chattels should not become fixtures had to be inferred from circumstances, while in the present case, and in the American ones referred to, the intention was clear and plainly expressed when the chattels were purchased.

The plaintiff says he objected to the removal of the old engine and boiler till told that a more valuable one was to be introduced. He says: "I saw Hollwey taking down the brick work about the old engine and boiler. I went to Meyers, the plaintiff in the winding-up suit, and told him; don't know what he did. A day or two after Hollwey saw me. he told me he was going to put in a better engine and boiler. Nothing else than this, * * In June or July I heard from Hollwey that there was some agreement between him and the defendants, but did not know its terms. * * Myers was plaintiff in the winding-up suit: he acted for me in sending letter to defendants." Hollwey says that when buying from the plaintiff he told him he intended to put in a new engine and boiler, and did not think he needed to ask leave to remove the old ones. When he saw Meyers he told him they were going to put in better machinery. The old machinery was actually sold and delivered before the plaintiff came and made objection.

The defendant, Inglis, says he saw Meyers on the street about the time of the boiler being put in, met him casually, he spoke of the machinery we were putting in, and he (Inglis) told him of the condition on which it was sold; Meyers made no objection.

There does not seem much equity in the plaintiff's claim. The place was sold by him for \$9,500. Payments were made

amounting to \$2,500, and buildings and improvements made which, after deducting the price of the engine, boiler, hangers, and pulleys, would still leave the place worth \$14,550. There is conflicting evidence on the subject. But from the best judgment I can form the security for the plaintiff's mortgage would be ample.

The cases referred to by the plaintiff were such as lay down the general rule that *quicquid plantatur solo solo cedit*, a rule that in its general terms is not denied.

I have no doubt that the hangers and pulleys were furnished under a similar agreement to that in respect of the engine and boiler. The agreement was executed in duplicate. Both are dated the 1st day of September, 1883. The word *three* in one of them seems to be written over an erasure of the word *four*. The other is not liable to the same remark. The argument is, that it was not signed in 1883, but in 1884. I do not think this is so. There is no erasure about the month or the day of the month, that is the 1st of September, and it could not have been intended to be September, of 1884, as it is not pretended it could have been later than February, 1884. Russell, a furniture manufacturer with Hollway, says that he made the arrangement for the hangers and pulleys—nothing was said about a lien on them, but they were sold on the same terms of payment as the engine and boiler. This is wide enough to comprehend the retention of the property till paid. The articles were furnished in the months of June, July, and August.

The only relief asked is an injunction, to which I do not think the plaintiff entitled, and the action is therefore dismissed, with costs.

See also *Hall v. Hazlett* (a), in which I understand judgment was recently given.

G. A. B.

(a) This case was decided in the Common Pleas Division, and has not yet been reported.

[COMMON PLEAS DIVISION.]

GARDNER V. KLEOPFER.



Assignment for creditors—Assent of creditors—Estoppel.

After the execution of a deed of assignment for creditors the assignee called a meeting of the creditors, at which the defendant, a creditor, attended and assented to a resolution appointing him one of the trustees to aid the assignee in winding up the estate ; and a resolution was also passed to pay certain arrears of wages ; and he examined and reported on the amount and condition of the stock. A few days afterwards he brought an action on his claim against the debtors, recovered judgment by default, and issued execution, contending that the assignment was invalid.

Held, that the defendant had assented to the assignment and was estopped from denying its validity.

THIS was an interpleader issue tried before Osler, J. A., without a jury, at Owen Sound, at the Fall Assizes of 1883.

The plaintiff was the assignee for the benefit of creditors of McKenzie and McKinnon, under a deed of assignment made on the 4th May, 1883.

The assignee called a meeting of creditors for the consideration of the affairs of the estate for the 15th May.

The defendant Kleopfer attended that meeting and assented to a resolution appointing him one of the trustees to act on behalf of creditors in assisting the assignee to wind up the estate. He examined and reported on the amount and condition of the stock, and did not dissent from a resolution prepared by the creditors at the meeting referred to, to pay certain arrears of wages to the men employed in the manufactory carried on by the debtors.

A few days afterwards he brought an action against the assignors, recovered judgment by default, issued execution thereon, and seized the property assigned, contending that the assignment was invalid because it contained unreasonable conditions to which creditors were not obliged to consent.

It is unnecessary to set out the conditions of the deed or the objections taken to them, as the judgment does not turn upon them.

Creasor, Q.C., and Wilson, for the plaintiff
Lash, Q.C., for the defendants.

The learned Judge delivered the following judgment:

November 13, 1884. OSLER, J. A.—I do not propose to discuss the questions which the defendant's counsel argued as to the sufficiency of the assignment, some of which may turn out to be very formidable. I recommend anybody who prepares assignments not to burden them with conditions, as the fewer conditions contained in instruments the better.

Upon the other point it appears to me that the defendant is out of Court. I find that the fact sworn to by McMillan, Cleland, the plaintiff, and particularly by Martin, namely, that of the defendant's assent to the assignment, is clearly proved. I have no doubt that at that meeting he did assent to become trustee and to act under the deed. I see no reason to discredit Martin, and the witnesses who have been excluded from Court, and have not heard of any other's evidence. I think they have given their evidence honestly. I do not desire to say that anybody has sworn falsely, but I must at all events hold that the defendant's recollection of what actually occurred is not correct. I accept the evidence of the others, not only as to that but also as to the conversations between the defendant and the workmen.

Upon these facts it appears that it is too late to set aside the deed on behalf of the defendant that he has not seen the deed. He has not said so, and it has not been shewn that the deed was not read, nor is it an unwarrantable inference that it was produced and read at the meeting. I then the defendant is in the position of a creditor who has assented to the deed. All the requisites of an estoppel are contained in his conduct. He was present at the meeting, a large meeting of the creditors, accepted the position of trustee, gave all the creditors reason to believe he was assenting to what was being done, and acted as trustee.

inspecting and reporting on the stock; and without giving them a word of warning, in the course of a few days issued a writ and recovered judgment for his claim, a proceeding which, so far as I can see, was taken in collusion with the debtors, and for the express purpose of attacking the very assignment he had thus assented to.

I do not think the case of *Thorne v. Torrance*, 16 C. P. 445, conflicts with the view I take, and therefore I give judgment for the plaintiff, with costs.

The following authorities may be referred to: *Banford v. Baron*, 2 T. R. 594, note; *Bock v. Gooch*, 4 Camp. 232 at p. 234; *Ex p. Cawkwell*, 1 Rose 313; *Marshall v. Barkworth*, 4 B. & Ad. 508; *Ex p. Alsop*, 1 DeG. F. & J. 289; *Ex p. Stray*, L. R. 2 Ch. 374.

Judgment for the plaintiff.

[COMMON PLEAS DIVISION.]

IN RE THE BELL TELEPHONE COMPANY AND THE TELEPHONE MANUFACTURING COMPANY AND THE MINISTER OF AGRICULTURE.

Patent Act of 1870—Court, constitution of—Dominion Parliament—Ultra vires—Power of Minister—Prohibition.

Sec. 28 of the Patent Act of 1872, after specifying certain cases in which patents are to be null and void, provided that in case disputes shall arise under this section as to whether a patent has or has not become void, such disputes shall be settled by the Minister of Agriculture or his Deputy, whose decision shall be final.

Held, that a Court or judicial tribunal for the determination of the matters referred to in the section was constituted by the Act: that the constitution of such a Court was not *ultra vires* of the Dominion Parliament as infringing Provincial legislation; and that it was competent for the Minister to decide as to the existence of disputes arising for his decision. Prohibition therefore was refused.

THIS was an application by the Bell Telephone Company of Canada calling upon the Minister of Agriculture for the Dominion of Canada, and the Telephone Manufacturing

Company of Toronto, to shew cause why a writ of *prohibition* should not be issued to restrain all further proceedings in the making an application then pending before the said Minister for the cancellation of Patent No. 7789, dated 22nd August, 1877, granted to Alexander Graham Bell, for Bell's system of Telephoning.

The grounds set forth in support of the motion for the writ were (1) that no dispute within the meaning of the 28th section of the Patent Act of 1872, 35 Vic. ch. 26, D., had arisen as to whether the patent had or had not become void under the provisions of that section: (2) that the matters alleged in the petition of the Telephone Manufacturing Company to the Minister disclosed no right, interest, or authority in them to dispute the validity of or demand cancellation of the patent: (3) that section 28 of the Patent Act was *ultra vires* of the Parliament of Canada, the effect of it being to create a Court for the adjudication of questions relating to property and civil rights, &c.

That since the occurrence of the matters relied on by the petitioners for invoking the decision of the Minister the patent had been twice extended for two several periods of five years, and its validity recognized so far as regarded all matters which had occurred prior to such extensions.

On 10th November, 1884, the motion was argued *McCarthy*, Q.C., *MacLennan*, Q.C., *McMichael*, Q.C., *Lash*, Q.C., and *S. G. Wood*, for the applicants, referred to *B.N.A. Act*, secs. 91-2; *Smith v. Goldie*, 7 A. R. 628; 9 S. C. R. 46; *Lloyd on Prohibition*, p. 7; *Great Western R. W. Co. v. Waterford and Limerick R. W. Co.*, 17 Ch. D. 493; *South Eastern R. W. Co. v. Railway Commissioners*, 6 Q. B. D. 586; *Toomer v. London, Chatham and Dover R. W. Co.*, 2 Ex. D. 450; *Warwick Canal Co. v. Birmingham Canal Co.*, 5 Ex. D. 1; *Chabot v. Lord Morpeth*, 15 Q. B. 446; *James v. South Western R. W. Co.*, L. R. 7 Ex. 287; *Ashby v. White*, 1 Sm. L. C., 8th ed., 264; *Hathway v. Doig*, 6 A. R. 264; *Ex p. Sidebotham*, 14 Ch. D. 459, 465; *Dimes v. Grand Junction Canal* 3 H. L. Cas. 759, 771;

Palmer v. Hutchinson, 6 App. Cas. 619-624; *Labalmondiere v. Frost*, 1 E. & E. 529; *Queen's Ins. Co. v. Parsons*, 7 App. Cas. 96.

F. Arnoldi and *J. R. Roaf*, contra, referred to *High* on Extraordinary Remedies, pp. 549, 553, 558, *et seq.*; *Full v. Hutchins*, 2 Cowp. 422; *Smith v. Goldie*, 9 S. C. R. 46; *Valin v. Langlois*, 3 S. C. R. 1, 17; *Queen v. Burah*, 3 App. Cas. 889; *Cotè v. Morgan*, 7 S. C. R. 1; *Brown v. Cocking*, L. R. 3 Q. B. 673; *Joseph v. Henry*, 19 L. J. N. S. Q. B. 369; *Elston v. Rose*, L. R. 4 Q. B. 4; *Cushing v. Dupuy*, 5 App. Cas. 409; U. S. Dig. N. S., vol. 5, p. 625.

McCarthy, Q.C., in reply referred to *L'Union Jacques de Montreal v. Belisle*, L. R. 6 P. C. 31; *Citizens' Ins. Co. v. Parsons*, 7 App. Cas. 96, 116, 117; *Colonial Building and Investment Association v. Attorney-General of Quebec*, 9 App. Cas. 157; *Mackonichie v. Lord Penzance*, 6 App. Cas. 424.

November 21, 1884. OSLER, J. A.—The question before me is, whether a writ of prohibition should be issued to restrain the Minister of Agriculture from entertaining or continuing an enquiry as to the nullity and avoidance of a patent under section 28 of the Patent Act, 1872.

This section provides that every patent shall be subject and expressed to be subject to the condition that at the end of two years from its date it shall be null and void unless the patentee shall, within that period, have commenced and thence continuously carried on the manufacture of the invention in Canada, and shall also be void if after the expiration of twelve years from its date the patentee imports the invention into Canada. "Provided always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture, or his deputy, whose decision shall be final."

It is contended that prohibition ought to be granted on several grounds.

First.—It is said that the section is *ultra vires*. The Parliament of Canada has in effect created a Court of Justice of Civil Jurisdiction other than the general Court of Appeal provided for in section 104, B. N. A. Act.

Second.—That in assuming to confer on the Minister authority to determine disputes respecting the nullity or validity of a patent, the Parliament is legislating in respect of property and civil rights in the Province.

Third.—That if not *ultra vires* yet that the condition precedent to the exercise of the Minister's jurisdiction did not exist, inasmuch as no disputes had arisen between the patentee and other parties which he could be called upon to decide.

Fourth.—That if a Court had been constituted it was one of which the machinery was so defective and the powers so limited that it was incapable of administering justice between disputants; and that the jurisdiction exercised by the Minister under the section must be confined to cases in which parties go before him by consent.

The arguments before me took a wide range, but I think the only questions necessary to be considered are the following: Whether a Court or judicial tribunal for the judicial determination of the matters referred to in the section has been constituted by the Act: in other words, whether the duties of the Minister are of a judicial or of an administrative character. If judicial, whether the constitution of such a forum is *ultra vires* the Dominion Parliament, as infringing upon subjects of exclusive Provincial legislation: B. N. A. sect. 92, sub-s. 13, 14.

If the duties of the Minister are executive merely, then beyond question prohibition does not lie: *Chabot v. Lord Morpeth*, 15 Q. B. 446, 459. On the other hand, if the Minister has been legally constituted a forum or tribunal for determining these questions, and he is not exceeding his jurisdiction, I have nothing to do with the nature of its constitution, nor am I at liberty to say that it is less a Court or tribunal because some of the powers usually conferred upon a Court are wanting or because the machinery

is defective (if it be so,) or its modes of ascertaining and acting upon facts different from those employed in the ordinary tribunals of the country. Therefore it is beside the question to urge that there is no power to summon witnesses or to examine them upon oath, or that the Court is one of original jurisdiction, from which there is no appeal, and thus in its very constitution foreign to the spirit of our laws, as Lord Abinger observed in *Ex parte Smyth*, 2 C. M. & R. 748; and see *Lord Camden v. Home*, 4 T. R. 382. If the tribunal and the power to constitute it exist, then so long as it is acting within its jurisdiction there is no ground for prohibition.

On the first question it appears to me that the Minister has been constituted a judicial tribunal empowered to decide *in rem* upon the status of the patent. There are found the three constitutional elements of a Court. The plaintiff, the party who asserts the nullity, the defendant, the patentee who affirms the validity of the patent, and the Judge, in the person of the minister empowered to enquire into the facts, to determine the law, and to declare the result by a definitive decree.

On this subject I desire to quote a passage from the printed report of a decision of a former Deputy Minister of Agriculture, Mr. J. C. Tachè, which I find referred to with approval in the judgment of the Supreme Court in *Smith v. Goldie*, 9 Sup. Ct. R. 46, at p. 68.

"The constitution of this tribunal is not of an unknown character; such jurisdiction is given to the administration in many countries; and in some, in the Austro-Hungarian Empire, for instance, that jurisdiction extends so far as to vest in the executive officer the exclusive power of deciding all cases concerning invalidity or lapsing of patents. The tribunal is not devoid of all means of getting at the truth, the fact of not being restrained by fixed rules of procedure and stringent modes of evidence being a compensation for the want of power to compel witnesses. It is self evident that it was the intention of the law maker to exact only one condition in the Judge's mind in delivering his deci-

sion, that he be convinced of the substantial justice of such decision on sufficient information, no matter how obtained.

“Notwithstanding that this tribunal is not restricted by fixed rules of practice, it is nevertheless bound to abide by the rules of common justice, by the dictation of common reason, and to be enlightened by such decisions as may be held to embody the common consent of mankind.”

It is not for me to express an opinion as to the wisdom of the policy which dictated the formation of such a tribunal in a country and among a people like ours, accustomed to yield obedience to laws administered through known forms and by Courts having powers to compel the attendance and to sift the evidence of witnesses.

One can only say that the Minister who enters upon such an enquiry as that which is in question must do so under a much graver sense of responsibility than that which is felt by an ordinary tribunal, and will long hesitate in arriving at a decision destructive of acquired rights where the least room for doubt exists, especially if under any circumstances the same question may be raised in an action *inter partes*, in the ordinary Courts.

On this branch of the case I have no doubt that as the Minister's proceedings are of a judicial character prohibition will, lie if the section is *ultra vires*, or if he is exceeding the jurisdiction conferred upon him thereby.

I refer to the *Warwick Canal Co. v. Birmingham Canal Co.* 5 Ex. D. 1; *The South Eastern R. W. Co. v. Railway Commissioners*, 6 Q. B. D. 586; *North London R. W. Co. v. Great Northern R. W. Co.* 11 Q. B. D. 30; *The Queen v. Local Government Board*, 10 Q. B. D. 309, and may quote an observation of Brett, L. J., in the last case. He says, at p. 321: “My view of the power of prohibition at the present day is that the Court should not be chary in exercising it, and that wherever the Legislature entrusts to any body of persons other than to the Superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt

to exercise powers beyond the powers given to them by Act of Parliament."

The cases of *Coté v. Morgan*, 7 S. C. R. 1, and *Poulin v. Corporation of Quebec*, 9 S. C. R. 185, may also be usefully referred to on the question when and against whom the writ of prohibition may be granted, or of the propriety of testing the constitutionality of an Act of the Legislature by this mode of procedure.

The next question is, whether the section under consideration is *ultra vires* the Parliament of Canada.

Under the B. N. A. Act, section 91, the *exclusive legislative* authority of the Parliament of Canada extends to *all matters* coming within the classes of subjects, *inter alia*, sub. sec. 22, Patents of invention and discovery.

Property and civil rights within the Province, and the administration of justice, including the establishment, &c., of Provincial Courts, are of the matters assigned exclusively to the Provincial Legislatures.

Nevertheless, as regards property and civil rights, it is settled that the Parliament may legislate where it becomes necessary to do so for the purpose of legislating generally and effectually in relation to matters within their own legislative authority: *Cushing v. Dupuy*, 5 App. Cas. 409, 415; *Valin v. Langlois*, 3 S. C. R. 1, 5 App. Cas. 115; *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 96, 107, 108, 109.

Patents of invention, &c., though property and civil rights in the Province in which the holder may be domiciled, yet confer rights exerciseable in any Province of the Dominion, and all legislation on the subject is, from its very nature, in a high degree a matter of policy of the general government.

I quote another passage from Mr. Tache's decision.

"The intention of the Legislature, as shewn by the policy of the legislation, is evidently to guard against the danger of Canadian Patents, granted to aliens, being made instrumental to secure the Canadian market in favour of foreign patents to the detriment of Canadian industry, for, in the measure that the right of taking patents was

extended, the remedy against the dreaded danger was made more ample, but at the same time the jurisdiction over such cases of disputes as might arise, was transferred from the judicial tribunals to the administrative tribunal,"—this, I think, is what Mr. Justice Henry is referring to, when in *Smith v. Goldie*, 9 S. C. R. 68, he speaks of the matter being solely a matter for ministerial and not judicial determination—"evidently for the purpose of avoiding an over strict application of the provisions made against the possible evil of a patent being taken for the sole purpose of depriving Canada from the use of a useful invention. The 28th section is also intended as a sort of protective policy in favour of Canadian labour. The Legislature has, certainly not without intention, provided for a kind of paternal tribunal formed by the Commissioner of Patents, the natural protector of patentees, which intention can be no other than that every case should be adjudicated upon in a liberal manner."

Upon the best consideration I have been able to give to the subject I am of opinion that the section (28) is not *ultra vires*, or in conflict with the powers assigned to the Provincial Legislatures. Though property and a civil right, it is yet one of parliamentary creation, and I see no reason why the same power which gives it birth and limits the term of its existence, should not also, as a matter of policy, and for the purpose of effectual legislation on the subject, also provide a special mode of enquiring into and deciding upon the question whether the conditions upon which it was granted, to which it is expressed to be subject, and on which its existence depends, have been complied with.

I cannot on principle distinguish this legislation from many of the instances referred to by Ritchie, C.J., in *Valin v. Langlois*, 3 S. C. R. 1, at pp. 23-24, in which judicial powers are conferred in some cases on individual Judges, in others on Provincial Courts, to administer relief arising under Dominion Acts. I may refer, *inter alia*, to the following: The Public Works Act, 31 Vic. ch. 12, sec. 48,

provides that costs in awards under that Act shall be taxed in some cases by the proper officer of certain named Courts, in others by a Judge of the Supreme Courts.

The Act for the settlement of the affairs of the Bank of Upper Canada, 31 Vic. ch. 17, gives authority to the Court of Chancery or a judge thereof to make orders and directions with reference to the trusts therein mentioned.

The 31 Vic. ch. 23, an Act to define the privileges of the House of Commons, &c., makes provision for the immediate stay of and putting an end to all proceedings, civil or criminal, upon the certificate of the speaker in certain cases.

The Act relating to Banks and Banking, 34 Vic. ch. 5, enables the Superior Courts of law and equity to adjudicate in a summary manner upon the right of parties legally entitled to shares, &c. See *Re Ontario Bank*, 44 U. C. R. 247.

The Public Lands Act, 35 Vic. ch. 23, provides for a summary remedy on application to a Judge of any Court having competent jurisdiction in cases respecting real estate, for the delivery of land on proof to his satisfaction that land forfeited should properly revert to the Crown.

So in the very Act in question we find provisions made with regard to actions for the infringement of patents, and impeaching them by *sci fa*, &c., in the Provincial Courts, and the powers of such Courts and the procedure in the action. See *Aitcheson v. Mann*, 9 P. R. 253, 473. Except that the power has been conferred upon the Minister of Agriculture instead of a Judge or a Court *eo nomine* and that no mode of procedure has been provided, I do not see any real distinction between this case and many others of which the foregoing are examples.

There is nothing absolutely inconsistent in section 26 in the group of sections entitled, "Assignment and Infringement of Patents," which provides that the defendant in any action for the infringement of a patent may specially plead any *fact* or *default* which by this Act or by law would render the patent void.

That may merely leave the party to plead the act or default where the Minister has not adjudicated or has

declined to adjudicate upon the dispute, or to plead it as a defence or reply where there has been an adjudication in fact.

3. As to the existence of a dispute calling for the decision of the Minister, I think it is for him to decide upon the *status* of the parties. I cannot say *a priori* that no one but the Attorney-General on behalf of the public can do so where there is no individual or corporation actually injured. In a sense, every one is interested in having the patent declared null and void where the conditions have not been complied with, and here one of the public has raised the question. It is for the Minister to say whether it is desirable to entertain a dispute originated in this manner, and whether it would not be more advisable to leave parties who desire to attack a patent to do so *by sci. fa.* under sec. 29.

I have considered whether sec. 28 could be restricted to cases where parties go before the Minister by consent. I do not see my way to so holding. Nor do I think that an extension of the term of the patent under sec. 17 affirms anything as to the continued validity or existence of the patent. It seems merely a question of expense whether the patent is granted in the first instance for five, ten or fifteen years. The holder appears to be entitled to the extension without any enquiry, as a matter of form, upon payment of the fees.

Of course, if the Minister has no jurisdiction, if the Act is *ultra vires*, or a dispute has not in point of law arisen from his decision, the validity of the patent is still open for consideration in an ordinary action.

I have, out of respect for the many learned counsel who so ably argued the case before me, given my individual opinion as to the merits of the application. But if that opinion had been different, I think the result must have been the same; as the principal question, viz., the jurisdiction of the Minister, is concluded, so far as I am concerned, by the decision of the Supreme Court, in *Smith v. Goldie*, *supra*.

I therefore dismiss the motion.

[COMMON PLEAS DIVISION.]

HUGHES V. THE HAND-IN-HAND INSURANCE COMPANY.

Insurance—Reference to arbitration—Costs of arbitration and award.

After an action had been commenced on a policy of insurance the defendants gave notice of arbitration under the statutory condition, when the Court made an order that, on the defendants abandoning all defences and admitting their liability under the policy sued on, all proceedings in the action should be stayed, the plaintiff to sign final judgment and proceed in the action for the amount which might be awarded him, together with the costs of the action, &c. And it was further ordered, without the consent of the defendants, that either party, after the making of said award, might apply to a Judge in Chambers in respect of the payment of the costs of the reference and award. The arbitrators awarded to the plaintiff the full amount of his claim. On application to ROSE, J., an order was made directing the defendants to pay the costs of the reference and award.

On appeal to the Divisional Court, CAMERON, C. J., was of opinion that the appeal should be allowed, there being no jurisdiction over the costs on such a reference, and GALT, J., that it should be dismissed.

The Court being equally divided, the judgment was affirmed.

THIS was an appeal from the decision of ROSE, J., ordering the defendants to pay the costs of a reference to arbitration and award.

The action was brought on a policy of insurance containing the statutory conditions.

After the suit was commenced the defendants gave notice for arbitration, and this Court made an order, of which the following is an extract: "And the counsel for the defendants agreeing thereto, and abandoning all defence to the action, and admitting their liability under the policy sued on, it is ordered that all proceedings in this action be stayed, the plaintiff to be at liberty to sign judgment and proceed in this action for such amount as may be awarded to him by the arbitrator or arbitrators now or hereafter to be appointed between the parties under the policy of insurance sued on in this action, and the statutory condition thereon in that behalf, together with the costs of this action * * And it is further ordered, without the consent of the defendants, that either party to be at liberty after the making of said award to apply to

a Judge in Chambers in respect of the payment of the costs of the reference and award."

An arbitration was accordingly had, and the arbitrators awarded to the plaintiff the full amount of his claim.

An application was then made to Rose, J., in Chambers, who made an order directing that the defendants should pay to the plaintiff the costs of the reference and award.

During Michaelmas sittings the defendants moved on notice to set aside the order.

During the same sittings, November 22, 1884, *W. A. Foster*, and *J. B. Clarke*, supported the motion. There is no jurisdiction to order the defendants to pay the costs of the arbitration and award, and there was no consent on the defendants' part which might give jurisdiction, for when the order directing the arbitration was drawn up it was expressly agreed, and it is so stated in the order, that no such consent was to be considered to have been given. This is not an arbitration in a cause, but is wholly independent of any cause, namely, by contract between the parties arising under the statutory conditions; and when the arbitration is independent of any action the rule is, that each party pays his own costs of the arbitration, and half the costs of the award. There is clearly the right to the arbitration under the statutory condition independent of any order of the Court: *McInnes v. Western Ass. Co.*, 5 P. R. 242; 30 U. C. R. 580.

G. H. Watson, contra. The defendants argument is based on the contention that the arbitration arises wholly on the statutory conditions. This is not the case. The order is made in the cause, and it contains matters not the subject of the statutory condition, for instance it contains a stay of proceedings in the cause. The whole proceedings are taken in the cause, and the award is made in the cause. The case comes within sec. 189 of the C. L. P. Act, R. S. O. ch. 50. Under the circumstances there was clearly jurisdiction to order the costs to be paid by the defendants, and the order should be upheld. He referred to *Tregoning v.*

Attenborough, 7 Bing. 733; *Sim v. Edwards*, 17 C. B. 527; *Bouvier's Law Dic.* vol. 2, p. 16, Tit. "Leave of Court"; *Bacon's Ab. Pleas E.* 2, p. 235.

December 20, 1884. GALT, J.—By the express terms of the order, made with the consent of both parties, the plaintiff was to be entitled to the costs of the action. The Court did not make any provision as to the costs of the reference and award, but ordered that either party should be at liberty, after the making of the award, to apply to a Judge in Chambers respecting them.

It was contended by Mr. Foster and Mr. Clarke that as there was no consent on the part of the defendants as to the costs of the reference, the Court had no power to direct their payment, no such power having been included in the order or in the reference.

There is no doubt it is laid down in *Taylor v. Lady Gordon*, 9 Bing. 570, at p. 572: "The general rule in cases of reference is, that where the order of *Nisi Prius* is silent upon the subject of the costs of the reference and award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expenses and the half of the award."

This case, however, does not come within that rule. When the Legislature were considering what were reasonable and proper conditions to attach on policies of insurance, they enacted condition 16: that "If any difference arises as to the value of the property insured, of the property saved, or amount of the loss, such value and amount, and the proportion thereof (if any) to be paid by the company, shall, whether the right to recover on the policy is disputed or not, and independently, of all other questions, be submitted to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the party insured and the other by the company, and a third to be appointed by the persons so chosen;" and such reference shall be subject to the

provisions of "*The Common Law Procedure Act*; and the award shall, if the company is in other respects liable, be conclusive as to the amount of the loss and proportion to be paid by the company."

Nothing is said about costs, and if the contention of the defendants be correct, each party would in a case of an arbitration under this section be saddled with his own costs of reference, although, as in the present instance, the arbitrators have unanimously found the plaintiff to be entitled to the full amount of his policy; and although it might be found that an insured had preferred a most unreasonable claim, involving the examination of numerous witnesses, the company would be subjected to costs, although it might be established that the loss did not exceed half the amount sought to be recovered. To avoid so manifest a failure of justice the Legislature has enacted that these references shall be subject to the provisions of the *Common Law Procedure Act*.

This reference is most emphatically a compulsory reference; each party is obliged to submit to it. We find then that by section 189 of that Act the question of costs is left to the Court or Judge by whom the order is made, the order being "upon such terms as to costs and otherwise as such Court or Judge thinks reasonable."

In the case now before us the Court ordered "that either party should be at liberty, after the making of the award, to apply to a Judge in Chambers in respect of the payment of the costs of the reference and award."

This was in strict accordance with the provisions of section 189, and, in my opinion, should in all like cases be adopted, in order that the Judge before whom the application is made may decide whether or not costs of the reference and award should or should not be allowed.

In the present case the arbitrators have awarded the full amount of his claim to the plaintiff, and I see no reason why he should not be repaid the costs to which he has been put.

This appeal should be dismissed, with costs.

CAMERON, J.—I regret to find myself unable to agree with the opinion just pronounced. The reference in this case was not under any rule or order of Court, but a submission under a statutory condition on the policy of insurance issued by the defendants to the plaintiff. This condition is silent as to costs, but provides that the reference shall be subject to the provisions of the Common Law Procedure Act, and the Common Law Procedure Act makes no provision whatever as to costs under voluntary submissions.

Under section 214 of R. S. O. ch. 50, it is provided that where the parties or any of the parties to any instrument in writing agree that any existing or future differences shall be referred to arbitration, and any of the parties so having agreed nevertheless commence an action at law or suit in equity against the other party in respect of the matters so agreed to be referred, then upon the application of the defendant, after appearance or before plea or answer, and upon the Court or Judge being satisfied that no sufficient reason exists why such matters ought not to be referred to arbitration according to such agreement as aforesaid, and that the defendant was, at the time of bringing such action or suit, and still is ready and willing to join and concur in all acts necessary or proper for causing such matters so to be decided by arbitration, the Court in which such action or suit has been brought, or a Judge thereof, may make a rule or order staying all proceedings in such action or suit on such terms as to costs and otherwise as to such Court or Judge seem proper.

It is clear the power given by this provision is as to the costs of the suit and the application to stay proceedings, and has no reference to the costs of the reference or arbitration.

The statutory condition of the policy making the reference subject to the provisions of the Common Law Procedure Act, is to enable the parties to conduct the proceedings, secure the attendance of witnesses, &c., in

the manner provided for by that Act, and not to add to or take anything from the terms of the submission. The law is too clear to leave any room for doubt, that where the reference is silent as to the costs of the reference, though made in a cause, and by order of a Court or Judge, costs of such reference cannot be given to either party.

In *Taylor v. Lady Gordon*, 9 Bing. 570, at p. 573, Chief Justice Tindal thus stated the rule in reference to costs: "The general rule in cases of reference is this, that where the order of *Nisi Prius* is silent upon the subject of the costs of the reference and award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expenses and the half of the award."

The rule under which the costs of the reference in the present case were allowed was made by this Court under section 214, above cited, and does not, if the view I have presented be the correct one, warrant the order made by my brother Rose, which has been appealed.

It also appears to me it was not the intention of the rule staying proceedings pending the reference to give the Court a discretion to deal with the question of costs, but was a permission to make a subsequent application for costs, if under the submission the successful party should be found entitled to have costs. I am of opinion, therefore, the appeal should be allowed.

ROSE, J., was not present during the whole of the argument, and took no part in the judgment.

The Court being equally divided, the judgment was affirmed, and the appeal dismissed.

Appeal dismissed.

[COMMON PLEAS DIVISION.]

HAYS V. ARMSTRONG.

Provincial Election—Returning officer—Refusal to delay return after notice of recount—Evidence of—“Person aggrieved”—Jurisdiction to make order—R. S. O. ch. 10, secs. 125, 181.

Action by the plaintiff, a defeated candidate, at an election for the Local Legislature, against the defendant, the returning officer, for wilfully contravening the provisions of R. S. O. ch. 10, sec. 125, in not delaying his return after receiving notice from the County Judge of a recount of the ballots.

The County Judge had mailed a notice to the defendant, which it was not controverted had reached him in time, and a duplicate of it was left at his residence with his wife.

Held, affirming the judgment of WILSON, C.J., at the trial, CAMERON, C.J., *dubitante*, that the evidence, set out below, did not shew that the notice came to defendant's knowledge before he made his return, and therefore he did not contravene the section, so that there could be no recovery.

Per CAMERON, C.J., doubting, on the ground that the defendant had not affirmed by his oath that the fact of a recount did not come to his knowledge before he made his return.

Held, also, *per* WILSON, C.J., that the plaintiff was a “person aggrieved” within sec. 181 of the Act; and that the defendant could not question the power of the County Judge to give the appointment or issue the notice on the material before him, because the process of the Court or Judge must be obeyed while it stands when as here there was jurisdiction.

THIS was an action tried before Wilson, C. J., without a jury, at Goderich at the Fall Assizes of 1884.

The plaintiff, an unsuccessful candidate at a parliamentary election, sued the returning officer for wilfully contravening the provisions of R. S. O. ch. 10, in not delaying in making his return under section 125 of that Act after receiving notice from the County Judge of a recount of ballots.

At the trial, upon the plaintiff closing his case, the defendant's counsel moved for judgment for defendant on the following grounds :

1. That the plaintiff was not a person aggrieved within the meaning of sec. 181 of the Act.

2. That the County Judge had not before him the proper materials upon which to give an appointment under sec. 117.

3. That there was no evidence of notice having been given to the defendant under the provisions of secs. 117 and 125, before the fifth day from the day on which he received the last return of any deputy returning officer, and hence no evidence of wilful default.

The learned Chief Justice held that as the plaintiff was prevented from exercising his legal right to have a recount by the ballot papers not having been before the County Judge, he was a person aggrieved, if the defendant had been guilty of a wilful contravention of the Act.

He further held that the defendant was not in a position to question the power of the Judge to give the appointment or issue the notice, the rule being that the process of the Court or Judge must be obeyed while it stands so long as the Court or Judge had jurisdiction, and he held he had jurisdiction.

He accordingly overruled the first and second objections.

The learned Judge, however, held that the service must have been a personal service, or a service upon another for the defendant which is afterwards shewn to have come to the notice or knowledge of the defendant before he made his return; and further held that such service or notice or knowledge had not been proved.

The action was therefore dismissed, with costs.

During Michaelmas sittings *Lount*, Q.C., moved on notice to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff for \$400, with full costs of suit.

During the same sittings, November 25, 1884, *Lount*, Q.C., supported the motion. The action is brought under sec. 181 of R. S. O. ch. 10, to recover the penalty given by that section for a wilful contravention of sections 122, 125, in making his return before the time limited by the Act, after a recount had been ordered under section 117, and the receipt of the notice under section 122 of the appointment given for such purpose. The service of such notice on the returning officer does not require to be personal. It

is sufficient if left at his place of business. Here his place of abode was also his place of business, and the notice was properly left for him there. There was evidence given that defendant admitted that he received such notice, and he was not called to deny it. If personal service is required then all the returning officer has to do in such case is to keep out of the way until the time has expired. There was also evidence given of personal notice on the eighth day. It was the duty of the returning officer to keep himself informed during the time limited, whether or not a recount was required. There were other objections taken to the plaintiff's recovery, but the learned Judge found in the plaintiff's favour, and the plaintiff rests on the learned Judge's judgment on these points.

Aylesworth, contra. It is admitted that the action is brought for an infraction of section 181, namely, for making his return after receipt of notice, and not for returning too soon. Section 181 is a penal clause, and must be construed strictly: *Nicholls v. Hall*, L. R. 8 C. P. 322, 326; *Dickenson v. Fletcher*, L. R. 9 C. P. 1, at p. 7; *North Ontario Election Case*, Hodgins, 304, 341-2; and see also *Meirelles v. Banning*, 2 B. & Ad. 909; *Lewis v. Great Western R. W. Co.*, 3 Q. B. D. 195, at pp. 206, 211, as to the meaning of the word wilfully. Sections 122, 125 shew that the service must be personal. When personal service is not required it is expressly so stated as under sec. 175, where service is allowed on an inmate. The plaintiff also was not a "person aggrieved" within the meaning of section 181: *Hollis v. Marshall*, 2 H. & N. 755; *Boyce v. Higgins*, 14 C. B. 1; *Atkins v. Ptolemy*, 5 O. R. 366; *Pickering v. James*, L. R. 8 C. P. 489. In case the Court should be against the defendant there should be a new trial, as in consequence of the dismissal of the action the defendant did not offer any evidence on his own behalf.

December 20, 1884. ROSE, J.—The plaintiff contends that there was sufficient evidence to entitle him to a judgment, and on notice moves for an order setting aside the

judgment and to enter judgment for the plaintiff for \$400, with full costs of suit.

The defendant's counsel shews cause, and submits that if the judgment be set aside a new trial should be ordered, and not a judgment for the plaintiff, as the defendant has not offered evidence on his behalf, owing to the learned Judge having taken the same view of the plaintiff's case as counsel for the defendant did at the trial.

It will be necessary to examine the evidence as to service.

It appears that the County Judge mailed a notice to the defendant in a registered letter addressed to the village of Brussels, where his office was. It was not contended that he received this notice in time.

On the 6th of March, one Elliott, about ten or eleven o'clock at night, went to the defendant's residence in the township of Morris for the purpose of serving him with a duplicate original of the notice. The defendant was not at home, and he left it with the defendant's wife.

The return was made on the 8th of March. This was a day too soon, but nothing turns upon that as the statement of claim did not set up any claim upon that ground, and the learned Judge refused an amendment at the trial, as it did not appear that such early return was made for any wrong purpose. It appeared to be in consequence of an honest mistake as to whether an intervening Sunday was to be reckoned in computing the time.

This person, Elliott, testifies that he had a conversation with the defendant at the Express office in Brussels, within a few days after leaving the notice with the defendant's wife. He is uncertain as to the time, but thinks it was about three or four days after. At this conversation the defendant stated that he would not have complied with the notice if it had been served as the law did not compel him to take the ballot boxes to the County Judge. He admitted receiving the notice by mail, and as to the notice left with his wife, the following evidence in chief was given :

"Q. Do you know whether he had received the appointment which you left with his wife? A. I don't know anything about it. He said he had received a letter from Judge Toms."

"Q. Did he say anything with regard to having received any paper from his wife? A. Oh yes, I did ask him about that."

"Q. What did you say to him? A. I asked him if he got the paper from his wife. I think he said that he had."

* * My recollection distinctly is that he led me to believe that he had got the notice from his wife at that time. I don't recollect what time it was, but I think it was about three days after I had served her. If you could let me see those papers I could tell you pretty nearly the day. [The witness looked at the appointment, and said:] It was on a Friday. I am pretty sure it was on a Friday I saw him. * * I think the Friday after I had served his wife. Yes, I am pretty sure it was on a Friday I met him in the Express office. In fact I am satisfied that it was on a Friday I met him in the Express office. I am sure of it almost."

HIS LORDSHIP.—"Q. That was the time he admitted he had got the paper you had left with his wife? A. I don't recollect exactly what he said about the paper."

* * * * *

"Q. Did he say that he had got the paper? A. I don't say that he said so at any time, except that he told me he had got a letter from the Judge. I don't just recollect at present that he told me his wife had notified him, had given him notice, or told him of the service. It answered my enquiry when he told me he had got the notice from the Judge, and I did not enquire any further about the service on his wife. I didn't think anything about it after that. It was the notice of the Judge he satisfied me with."

The plaintiff was called. He gave evidence as to a conversation he had with defendant in which the defendant admitted having received the notice sent to him by mail, but "did not say anything about when he got the other notice," "or that he ever got it," nor did he say he did not get it.

The first page of the defendant's examination before the Master, prior to the trial, was put in, but it throws no light on this point.

This is the whole evidence as to service, or notice prior to making the return. In face of Elliott's statement that he "did not know anything about" whether defendant had received the appointment left with his wife: that he *thought* he said he had: that witness was *led to believe* he had: that he did not "recollect exactly what he said about the paper:" that he would not say that defendant *at any time* said he had received it: that he did not recollect that defendant told him "his wife had notified him, had given him notice, or had told him of the service:" that it answered his enquiry when he told witness he had got the notice from the Judge, and that he did not enquire further, I am of the opinion that the learned Judge came to the only conclusion warranted by the evidence, viz., that the plaintiff had failed to shew personal service or notice, and hence had failed to prove wilful default.

If we are asked by the plaintiff to speculate on the chances of a cross-examination of the defendant and his wife if they were put in the witness box, I think the probabilities are, they would deny that the defendant had notice, as counsel stated in argument that the defendant in his examination before the Master above referred to had already denied receiving notice.

We are not at liberty to refer to such examination, as it is not evidence before us save as to the portion put in.

In my opinion the motion must be dismissed, with costs.

GALT, J., concurred with ROSE, J.

CAMERON, C. J.—I do not find myself justified in dissenting from the opinion of my learned brothers just pronounced, because I cannot say that on the evidence it is shewn that the notice of the recount of the votes came to the defendant before he made the return complained of, and if he did not receive that notice and had no knowledge of it, he could not wilfully have contravened section 122 of the Election Act by not delaying the making of his return. The difficulty that weighs with me in causing

doubt of the soundness of the conclusion arrived at, arises from the fact that the defendant did not affirm by his oath that the fact of a recount of the votes did not come to his knowledge before he made his return. It was sufficiently shewn that notice was served on the defendant's wife at his place of residence in time before the return, and also that notice was mailed to him. *Prima facie* he ought to have received these notices.

It has been held by this Court that a notice of call proved to have been put in the post office will be presumed to have reached the person to whom it was addressed in due course of post, and service of many kinds of notices on the wife of a party at his usual place of residence is a sufficient service where the law does not in terms require the service to be personal; and in the absence of a denial under oath by the person to whom such notice is addressed, that he has received it, I have grave doubt as to whether it ought not to be presumed that he has in fact received it or had knowledge of it.

If the defendant did receive the notice, or was informed of it, he acted wilfully in contravention of the Act, and in violation of his duty. It is all important in the public interest that a returning officer should not be permitted to contravene the law of elections in respect to the discharge of his duty and thus interfere with the rights of candidates and electors.

I refer to the language of Lord Blackburn in *Smith v. Chadwick*, L. R. 9 App. Cas. at p. 196, as to what may in the present state of the law of evidence be the inference to be drawn from a party who may and does not give evidence in his own behalf on a point where there is a doubt. The learned Judge was dealing with a question whether the plaintiff was induced by the representations contained in the prospectus of a company to take shares therein, and said: "I think there are a great many other things which might make it a fair question for the jury whether the evidence on which they might draw the inference was of such weight that they would draw the infer-

ence, and whenever that is a matter of doubt I think the tribunal which has to decide the fact should remember that now, and for some years past, the plaintiff can be called as a witness on his own behalf, and that if he is not so-called, or being so called does not swear that he was induced, it adds much weight to the doubt whether the inference was a true one. I do not say it is conclusive."

This language is equally applicable to the case of a defendant, notwithstanding the burden of proof rests upon the plaintiff, when there is evidence that may fairly be submitted to a jury. In the present case, if there had been a jury, the plaintiff could not have been nonsuited, and the jury would have been justified in finding against the defendant. The difficulty is in saying that the learned Judge who found in favour of the defendant was so clearly wrong that the Court should interfere. I am not in a position to say so, and therefore, though entertaining very great doubt that the conclusion reached is the correct one, and fully under the impression that the defendant is escaping the consequences of a violation of his duty, I cannot feel justified in entirely dissenting from the opinion formed by the learned Chief Justice of the Queen's Bench at the trial, and from the confirmatory opinions of my learned brothers just delivered.

Motion dismissed.

[COMMON PLEAS DIVISION.]

HOENER V. MERNER ET AL.

Agreement—Promise to answer for the debt of another—Quantum meruit—Parties' minds ad idem.

A. M. was carrying on business as a brewer when, owing to financial difficulties, he left, and S. M., his brother, a large creditor, took charge thereof. The plaintiff claimed that at this time there was a large sum due him for wages under a special agreement made with A. M.; and that S. M. agreed, if he would remain, to pay him the past wages then due him, and like wages for the future.

Held, that the agreement by S. M. to pay such past wages being merely a collateral promise A. M. remaining liable, and not being in writing, could not be enforced.

Held, also, that, on the evidence as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory, the fair inference was that the parties' minds were never *ad idem*, and the recovery could only be on the *quantum meruit*.

THIS was an action tried at the last sittings of this Court for trials and assessments at Berlin, before Rose, J., and a jury.

The claim was for wages against the defendants, father and son.

The plaintiff's case was that in the month of November, 1883, he hired with the defendant Almon Merner (the son) to take charge of his brewery as foreman: that he was to make two brewings, and if they turned out good beer he was to have the same wages as one Jacob Bader had when he had charge of a brewery in Guelph: that the first brewings turned out well, and accordingly he became entitled to the same wages as Bader: that after thus working until the 21st of June the defendant Almon Merner, owing to some financial troubles, suddenly left the brewery and went to the States, remaining away about ten days: that while away the defendant Samuel Merner, a large creditor of the son, came to the brewery and promised him if he would remain he would pay him his wages for the past as well as the future, and that under such agreement he remained until the 24th of August when he was discharged.

Samuel Merner distinctly denied any agreement whatever to pay wages; and Almon said the agreement with him was, that if the plaintiff made good beer in summer as well as winter he should have fair wages, but that the beer made in the summer was a complete failure, involving very heavy loss, for which he counterclaimed.

The counter claim was abandoned at the trial.

It was not disputed that the plaintiff made good beer up to the hot weather; and evidence was given to shew that the failure in the summer months was owing not to any neglect or want of skill on the part of the plaintiff, but to poor hops and the premises being out of repair, and uncleanly.

The following questions were left to the jury, who returned the answers following them:

1. Did Hoener agree with Almon Merner that if he made good beer from the first and second brewings, then he should get the same wages as Jacob Bader did in Guelph? A. Yes.

2. Were the first and second brewings good beer? A. Yes.

3. If the agreement was not as set out in the first question, was it, that if Hoener made good beer all the year round, or during the summer, he should be paid good wages. And if not, then that he should get nothing or small wages? No answer.

4. Did Hoener make good beer all the time he was with the Merners? A. No.

5. If not, was it owing to his neglect or want of skill or want of good materials? A. Want of good materials.

6. Did Samuel Merner agree, if Horner kept on with his work, he would pay him for past as well as for future services? A. Yes.

7. Was Samuel Merner the real owner of the business? A. No.

8. What would be a good salary to pay Hoener? A. \$40 and board per month.

On these findings judgment was entered for the plaintiff against Samuel Merner for nine months wages at \$75 a month, and rent of a house \$5 a month, less nine months board at \$10, and less \$182 paid on account, this being according to the contract found by the jury to pay plaintiff the same wages as Jacob Bader received in Guelph.

Judgment was also entered against Almon Merner on the same principle for seven and a-half months, being up to the time he went away, when the new bargain was made.

During Michaelmas Sittings, *Osler*, Q.C., obtained an order *nisi* to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants, or for a new trial.

During the same sittings, December 3, 1884, *Osler*, Q.C., supported the order. The judgment cannot be supported as against Samuel Merner. His promise was merely a collateral one, and therefore should have been in writing: *Bond v. Treahey*, 37 U. C. R. 360; *James v. Balfour*, 7 A. R. 461. But apart from this, the finding should, on the evidence, have been for the defendants.

John King (of Berlin) contra. The promise made by Samuel Merner was not a collateral promise, but a new and original one: *McDonald v. Cook*, 1 U. C. R. 542, 546; *McDonald v. Glass*, 8 U. C. R. 245, 247; *Tumblay v. Meyers*, 16 U. C. R. 143; *Clark v. Waddell*, 16 U. C. R. 352. Upon the evidence the jury properly found for the plaintiff. The Court will not interfere on the weight of evidence: *Jenkins v. Morris*, 14 Ch. D. 674, 684, 686; *Solomon v. Bitton*, 8 Q. B. D. 176; *Freeman v. Crafts* 4 M. & W. 4; *McLean v. Dun*, 39 U. C. R. 551; *Dear v. Western Ass. Co.*, 41 U. C. R. 553; *Frey v. Wellington Mutual Fire Ins. Co.*, 43 U. C. R. 102, 113; *Hooper v. Christoe*, 14 C. P. 117, 121.

December 20, 1884. ROSE, J.—Against the judgment in this case Samuel Merner moves, submitting: 1. That on the authority of *James v. Balfour*, 7 A. R. 461, he cannot

he held liable for the wages up to the time Almon went away, as the promise was collateral, Almon remaining liable, and the agreement was not in writing.

In my opinion this is so, and, as to so much, he is entitled to be relieved from the judgment.

2. As to the balance, being for exactly two months and three days, he contends he is liable, if at all, for only \$40 a month, the plaintiff having had his board.

The plaintiff will not say that Samuel Merner did not ask him what wages he was receiving, and Samuel Merner positively states he did, and that the plaintiff said he was under no agreement as to amount, as he was awaiting the result of the summer brewing before making a bargain.

There is therefore no evidence that the plaintiff told Samuel Merner what his bargain with Almon was, while the evidence to the contrary is thus uncontradicted. As the jury have found that the fair wages would be \$40 a month and board, I do not think on the very contradictory evidence in this case the plaintiff should have more than the jury thought fair.

As the plaintiff received during the two months, say \$82, and as the wages at \$40 for two months and three days would amount to \$84, it seems to me that Samuel Merner should be relieved from the judgment entered.

Almon Merner asks for a new trial. The evidence is most unsatisfactory and contradictory. I am not in favour of interfering with the findings of juries except on some principle. That I may be dissatisfied with such findings is not, in my opinion, a ground for interference. The many cases cited by Mr. King fully sustain his contention as to the Court not interfering with verdicts of juries on such a ground merely.

In this case the plaintiff put his claim in his evidence not on the special agreement, but at the rate of \$60 a month, and a witness called by him to prove a conversation with Almon Merner, and therefore an accredited witness—I refer to Charles Krause, at p. 25 of the evidence—stated that Almon stated to him that the

bargain was, that if the plaintiff made as good beer in the summer as in the spring he would give him good wages.

On the other hand a witness called by the defendant to prove a conversation with the plaintiff—*Alexander Kaiser*, at p. 52 of the evidence—stated that the plaintiff told him that the bargain was that if he made good beer, he was to have the same wages as Jacob Bader in Guelph, and if the beer did not turn out good he got nothing. Both of these statements were made while the plaintiff was working for the defendant, and before any unpleasantness arose. Add to these statements the positive oath of each to a contract quite different to that sworn to by the other, and the only fair inference is, that the parties quite misunderstood each other, and, therefore, no *consensus* was arrived at. If this is so then the plaintiff is only entitled to succeed on the *quantum meruit*, *i. e.*, according to the finding of the jury, \$40 a month and board.

This would entitle him to \$40 for nine months	\$360
Less received on account.....	182

Balance	\$178
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He has received his board.

If the plaintiff will consent to the judgment against Samuel Merner being set aside without costs, and the judgment against Almon Merner being reduced to \$178 with full costs, then the motion for a new trial should, in my opinion, be discharged—otherwise granted, without costs.

CAMERON, C. J., and GALT, J., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

HOBBS ET AL. V. THE GUARDIAN FIRE INSURANCE COMPANY.

Insurance—Explosion by gunpowder—Liability—Statutory conditions.

In an action on a fire insurance policy subject to the statutory conditions, it appeared that an accidental explosion of gunpowder had taken place, which did considerable damage, a portion of the damage being caused by the explosion itself, and a portion by the fire consequent on the explosion.

Held, CAMERON, C. J., dissenting, that under statutory conditions Nos. 10 and 11, the company were liable only for the loss occasioned by the fire, but not for that caused by the explosion.

THIS was an action brought on a policy of insurance against fire subject to the statutory conditions.

The cause was tried before Wilson, C. J., without a jury, at London, at the Fall Assizes of 1884, when a formal verdict was entered for the plaintiff for the full amount of his claim.

An accidental explosion of gunpowder took place which did considerable damage, a portion of the damage was done by the explosion, and a portion by fire occasioned by the explosion. There was no dispute as to the facts nor as respects the amount of the loss.

By condition 10, the company is not liable for the losses following: *f.* For loss or damage occurring to buildings which contain articles therein mentioned and stored or kept on the premises. Among these "gunpowder" is mentioned, but nothing is said respecting any injury arising from the ignition or explosion of these articles. What is prohibited is their being kept on the premises without the permission of the company.

By condition 11, the company agree they will make good loss caused by the explosion of coal gas in a building, not forming part of gas works, and loss by fire caused by any other explosion or by lightning.

During Michaelmas Sittings, *Bethune*, Q. C., moved on notice to set aside the judgment entered for the plaintiff so far as regarded the loss occasioned by the explosion, and to enter it for the defendants.

During the same sittings, November 24, 1884, *Bethune*, Q. C., and *Marsh*, supported the motion. The question arises under the statutory conditions 10 (f) and 11, R. S. O. ch. 162. Condition 10 (f) provides that only certain quantities of combustible substances can be stored on insured premises, and amongst others not more than 25 pounds of gunpowder. Condition 11 provides that "the company will make good loss caused by the explosion of coal gas in a building, not forming part of gas works, and loss by fire caused by any other explosion or by lightning." The 11th condition must be read in the light of the maxim *expressio unius est exclusio alterius*, and as the condition expressly provides for liability for loss by explosion by coal gas, and is silent for loss by fire occasioned by any other kind of explosion, the inference clearly is that there is to be no liability for loss occasioned which is the result of such explosion. The loss here was occasioned by an explosion of gunpowder, and the only loss the defendants are liable for, is the loss occasioned by the fire consequent on such explosion, but not for the loss occasioned by the explosion itself. They referred to *Hare v. Horton*, 5 B. & Ad. 715; *Boatman Fire Ins. Co. v. Parker*, 23 Ohio St. R. 96; *Everett v. London Ass. Co.*, 19 C. B. N. S. 126; *May on Insurance*, 2nd ed., 621, 625; *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71; *Briggs v. North, Am. Ins. Co.*, 53 N. Y. 446, 448-9; *Scripture v. Lowell Mutual Ins. Co.*, 10 Cush. Mass. 356. In this case the claim is for loss occasioned by fire consequent on the explosion, and for loss occasioned by the explosion itself. The defendants have paid the loss occasioned by the fire, but deny their liability to pay the loss occasioned by the explosion alone. There are numerous American cases referring to losses connected with explosions, but all of these cases except the ones above cited, will be found to fall within one of three classes, namely: 1. Where loss is occasioned by fire when the fire is the result of explosion. The defendants admit their liability so far as concerns the loss occasioned by the fire, and have paid such loss. 2. Where the loss is occasioned by explosion when the explosion is consequent:

on the fire. The plaintiff clearly does not come within this class. 3. Where the policy contains no condition limiting the liability for loss occasioned by explosion. The plaintiff cannot invoke the aid of this class, as there is a condition expressly limiting their liability in such case.

Gibbons (of London), contra. The eleventh condition has a very different meaning from that which has been placed upon it by the defendants. The policy is a policy against fire, and the company are therefore liable for all losses by fire. The correct interpretation of condition 11 is that the company will be liable for explosions by coal gas, though no fire or damage by fire result therefrom, and in other cases, for an explosion not the result of fire no risk would be undertaken, or in other words, when the explosion is the result of fire, the company are liable. Here it was fire that caused the explosion. If the company desired to free themselves from liability they might have done so by a variation of the condition, provided such condition would be deemed to be reasonable. The maxim *expressio unius est exclusio alterius*, and the cases decided upon it have therefore no application here. The cases on the subject also shew that the non liability only arises where the explosion is remote from the loss, as when it occurs in a different building, but not as here where it is in the same building.

December 20, 1884. GALT, J.—Mr. Gibbons for the plaintiff, contends the defendants are liable for the total loss. Mr. Bethune, Q.C., and Mr. Marsh with him, assert that under the conditions endorsed on the policy the defendants are responsible only for the damage arising from the fire kindled by the explosion. It was very strongly urged by Mr. Gibbons that as fire was the agent which occasioned the explosion of the gunpowder, the whole of the damage done is attributable to fire. There can be no question as to the truth of the first proposition, but it was argued on the other side that by the express terms of the contract the defendants were responsible only for the damage done by the fire caused by the explosion.

It appears to me this is the correct construction of the condition. The defendants have in the same condition agreed to be responsible for all injury done by the explosion of coal gas, but they have limited their liability in all other cases to the fire caused by the explosion.

It was admitted by Mr. Gibbons that the explosion in this case was caused by some persons testing the quality of the gunpowder by the ignition of a match, so it is manifest the injury was not done by any fire other than that occasioned by the explosion, and as the company have agreed to make good loss caused by the explosion of coal gas without any limitation, but have restricted their liability in all other cases to loss by fire caused by any other explosion or by lightning, I am of opinion they are not responsible in this case for the loss occasioned by the explosion, other than that arising from the fire, and as this amount has been ascertained and paid, the defendants are entitled to have judgment in their favour.

I have carefully read the judgment in the case of *Scripture v. Lowell Mutual Fire Ins. Co.*, 10 Cush. Mass. 356, and if this had been a case on a fire insurance policy which contained no condition respecting explosion, I should have fully concurred in the opinion therein expressed. The circumstances were to a very singular extent the same as those now before us. The explosion was occasioned by a lad playing with gunpowder, and the greater part of the damage done was by the explosion, not by the fire.

As I have already stated, Mr. Gibbons based his argument on the fact that it was fire which caused the gunpowder to explode, and the insurance was against fire. But suppose the explosion had been of coal gas, this could only, so far as I am aware, be caused by the action of fire, and therefore there was no necessity for the legislature to require the company to be responsible in that case for loss caused thereby, unless they intended to draw a distinction between such an explosion, and one caused in any other manner, and to limit the latter to "loss by fire caused by any other explosion."

CAMERON, C. J.—On the argument the contention of the defendants, as presented by their counsel, seemed exceedingly forcible, but further consideration of the questions and the terms of the policy satisfy me that the plaintiffs are entitled to recover for the whole loss sustained.

The policy insures the plaintiffs on the property described therein, against loss or damage by fire. This, in the absence of any condition limiting the liability of the defendants, would entitle the plaintiffs to be paid for any loss which originated in a fire, and resulted therefrom. The case shews that the loss was occasioned by some of the employees of the plaintiff accidentally setting fire to some gunpowder stored in the premises insured, causing an explosion and setting fire to the building. The actual damage by the fire was admitted to be \$694.50, and the loss and damage otherwise caused by the explosion, and not attributable to fire to any greater extent than that the explosion itself was the result of the powder's ignition, was \$2,083.50, making the total loss \$2,778.

The contention of the defendants that they are not responsible for the loss directly flowing from the explosion is based upon the construction of conditions 10 and 11 of the statutory conditions in R. S. O. ch. 162, to which the policy in question is made subject.

Condition 10 expressly declares the insurer is not liable for losses arising under sub sections *a.* to *f.* inclusive, under none of which does the loss in the present case come.

Then section eleven provides the insurer will make good losses "caused by the explosion of coal gas in a building not forming part of gas works and loss by fire caused by any other explosion, or by lightning." By reason of the express risk assumed for fire caused by any explosion, it is urged under the *maxim expressio unius est exclusio alterius* damage by the explosion itself is excluded, and only such damage as was caused by the fire resulting from the explosion was insured against. The very strong case of *Hare v. Horton*, 5 B. & Ad. 715, was cited in support of the argument.

The answer of the plaintiff is, the explosion itself was the result of fire, and the true meaning of condition eleven is not to restrict the liability of the insurer, but rather to extend that liability, to the case of damage caused by coal gas explosions, though no fire or damage by fire should result therefrom, and for an explosion not the result of fire under a fire policy no risk would be undertaken by the insurer. The general terms of the policy covering the loss the rule embodied in the maxim *expressio unius, &c.*, has no place, or if it has it must operate against the insurers, as under condition ten there are express exemptions from liability not covering the loss in question. I am of opinion the plaintiff's contention is entitled to prevail.

The case is materially different from the case cited of *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71. The policy in that case contained the following exceptions, "neither will the company be responsible for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." It was held that the company was exempt from liability for damages resulting from an explosion in the course of and caused by the fire as well as for damages caused by fire originated by the explosion.

In the present case there is no such exemption as that set out, and to have made such an exception it would have been necessary to have varied the conditions in the manner indicated by the statute. These conditions are to be read from a common sense stand point, and are not to be interpreted by subtle legal maxims. As in *Stanley v. The Western Ins. Co.*, it was held where the term gas was used in the condition, without more, ordinary illuminating coal gas was intended, although the term gas would have included many other vapours; and so read would the insured suppose that he was not protected against loss by explosion, the result of fire. I should say not, but if an explosion occurred not caused by fire, he would not suppose that any loss he might sustain thereby would be within the terms of the policy. In England the insurer has a right to limit his liability in any way that he thinks fit, but in this Province

he cannot do so except under the restriction in the Act under which this policy was issued.

It will be well to see how far the authorities went in covering losses under a fire policy before the Legislature thought fit to interfere to prevent, on the subject of insurance against loss or damage by fire, the insurer and insured making just such bargains as they pleased, which is a paternal sort of providence exercised over the improvident or supposed improvident who endeavour to protect themselves against loss by insurance.

It is not a matter of doubt that damage to goods insured against fire injured by water in the effort to extinguish the fire, is a loss covered by the policy, and this is remoter from the action of fire than an explosion the result of fire.

The case of *Scripture v. Lowell Mutual Fire Ins. Co.*, 10 Cush. (Mass.) 356, is an American decision, apart from the effect of condition 11, identical almost in its facts with the present case, and I adopt the language of Cushing, J., in giving the judgment of the Court as embodying the reasons which in my opinion should entitle the plaintiff to succeed. After saying the question was a nice one, the learned Judge added, at p. 362: "Upon careful reflection, however, we have come to the conclusion that the received opinions upon the subject, and the adjudications referred to, are in accordance with reason and principle. It seems not to be denied that actual combustion produced by the ignition, of gunpowder is within the present policy. If, then a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why of the diverse but concurrent results of the combustion, the one should be ascribed to fire more than another. The plain fact here is, the application of fire to a substance susceptible of ignition, the consequent ignition of that substance and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible sub-

stance ; and as the combustion is the action of the fire this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff. * * In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote—for the agent is one and the same throughout, namely fire ; the *causa* was burning powder ; the *causa causans* was burning a match ; at each stage of the causation it was the action of fire.”

Assuming that scientists are right in saying that explosions are the result of combustion, no matter how the combustion is produced, the damage that follows is caused by fire, only more rapid in its effect in destroying the property upon which its force is directed than is the slower process of burning. But what difference can that possibly make in the principle of liability ? Take the case of a store wherein a stock of crockery is insured. The floor of the upper story being supported by a pillar or pillars, these are burnt through, causing the floor to give way, and the crockery is brought to the lower floor with a crash and destroyed. The fire has not acted as directly in destroying the stock as it would in the case of an explosion of gunpowder ; and it seems to me there can be no doubt of the responsibility of the insurer in the one case any more than in the other. So that the liability of the defendants depends entirely upon the proper effect to be given to condition 11. If that must be read, and the Court can be permitted so to read it in face of the statute, as if it were written, the company will not be liable for loss caused by explosion, but only for loss by fire consequent thereon, it is clear the case of *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71, is an authority that the loss resulting from the explosion in this cannot be recovered, and the amount paid into Court was sufficient to indemnify the plaintiffs against the loss suffered by fire, as distinguished from the damage directly resulting from the explosion. The difficulty that is in the defendants' way is caused by the fact that the policy does not, in terms, exempt them from indemnifying

the plaintiff against losses by explosions resulting from the action of fire; and the express assumption of responsibility for loss caused by explosions of coal gas, for fire caused by any other explosion, or by lightning, does not, where we are bound to construe all the provisions most strongly against the company, permit the engrafting of that exemption into the policy.

I am, therefore, of opinion that judgment must be entered for the plaintiff against the defendants, for their proportion of all the loss suffered, as well by the explosion as the consequent fire.

ROSE, J.—It may be admitted (1) that save so far as excepted the insurance under the policy in question covers all loss or damage occasioned by fire. (2) That the explosion of gun powder is occasioned by fire, and that the explosion is itself merely rapid combustion, and hence a fire. (3) That explosion of coal gas is caused by fire; and (4) That in most cases explosions are caused by fire.

The contract in this case may be read as follows:—The company insure against loss or damage occasioned by fire. The company will make good loss caused by the explosion of coal gas in a building not forming part of gas works. The company will make good loss by fire caused by any other explosion, or by lightning.

Is it not clear that a distinction is here drawn between loss by fire as an immediate cause, by explosion as the result of fire, and fire caused by explosion? Whether loss occasioned by lightning is a loss by fire might give rise to an interesting enquiry.

In the case before us the loss was not caused by fire in that the damage arose from the direct action of the fire upon the articles injured, *i.e.*, from combustion or ignition, but was caused by the explosion not followed by fire. There was a fire following the explosion. The loss by such fire is not in question. If the plaintiff's argument prevails and is carried to its logical conclusion, the result would be that if a cannon were fired off in a store and the

concussion destroyed the building the loss would be caused by fire. One would naturally struggle against such a conclusion, and in *Everett v. London Gas Co.*, 19 C. B. N. S. 126, and *Caballero v. Home Ins. Co.*, 15 La. Ann. 217, it was held that where the ignition of powder by fire was at a distance from the property injured, so that the injury was caused by the concussion, the loss was not caused by fire.

I cannot think that any one reading the contract, as I have ventured to above abstract it, would think all loss by explosions caused by fire was insured against. If so, why the necessity of saying that loss caused by the explosion of coal gas would be made good? This surely was a loss by fire equally with loss caused by the explosion of gun powder. Or what the necessity of providing for loss by fire following and "caused by any other explosion." If fire caused the explosion and explosion is rapid combustion and hence a fire, and fire follows the explosion and destroys the goods, surely if the plaintiff's argument is to prevail it was unnecessary to insert such a provision in a general fire policy.

I am of the opinion that the fair reading of the contract is, that "fire" means just what is understood by the term in every day life, namely: "ignition," "burning," &c., of the property insured: that "explosion" means "rending," "bursting:" and that clause eleven was introduced to make the company liable in cases of loss caused by explosion of coal gas only, and by fire following and caused by any other explosion. I think the maxim *expressio unius est exclusio alterius* applies.

In my opinion the motion should prevail, and judgment be entered for the defendants, with costs.

Motion allowed.

[CHANCERY DIVISION.]

LANGTRY V. DUMOULIN.

Rectory endowments—Rectory lands—29 & 30 Vic. c. 16—Construction—Maintenance.

Certain land was granted by patent from the Crown, dated December 26th, 1817, to D. B., J. B. R., and W. A. as trustees, for the sole use and benefit of the parishioners of the town of York forever, as a churchyard and burying ground for the inhabitants of the said town of York, and appurtenant to the Church then built thereon. This patent was surrendered to the Crown, and another, dated September 4th, 1820, was issued to the same trustees, reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so appropriated, and that such part of the said land as was not so required for the use of the parishioners should be held upon and for the trusts and uses thereafter stated, which trusts were as follows:—"In trust to hold the same for the sole use and benefit of the resident clergyman of the said town of York, and his successors appointed or to be appointed rectors of the Episcopal Church therein to which the said land is appurtenant, to make lease of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use," * * and when a rectory was erected and an incumbent appointed * * "the trustees should convey to such incumbent * * and his successors forever as a corporation sole to and for the same uses and upon the same trusts."

Certain other lands were also granted by another patent from the Crown, dated 26th April, 1819, to W. D. P., J. B., and J. S., upon trust to observe such directions, and to consent to and allow such appropriation and disposition of them, and to convey the same in such manner as should thereafter be directed by Order in Council. These lands were subsequently conveyed by W. D. P., J. B., and J. S. to the other trustees, D. B., J. B. R., and W. A.; by deed, dated July 4th, 1825, reciting an Order in Council dated December 2nd, 1824, requiring the grantors to convey the said lands to the grantees for the use of the Church and of the clergyman incumbent thereon for the time being (which recital was the only evidence of the contents of the Order in Council), "upon trust, nevertheless, that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the town of York, and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal Church, according to the rites and ceremonies of the Church of England therein, to which the said lands are appurtenant," which deed contained a proviso for conveyance by the trustees, upon the erection of a parsonage or rectory and presentation thereto, in the same terms as that contained in the patent of the 4th of September, 1820.

The town of York was subsequently incorporated as the city of Toronto, and by letters patent, dated 16th January, 1836, a parsonage or rectory was erected and constituted in the said city of Toronto, designated as the first parsonage or rectory within the township of York, otherwise known as the parsonage or rectory of St. James, and 800 acres of land were set apart as a glebe or endowment, to be held appurtenant with the said parsonage or rectory, and the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or rectory of St.

James, and by deed poll, dated the 10th February, 1841, reciting the patent of the 4th September, 1820, the deed of the 4th July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A., and J. G. S., the then trustees, granted the said lands described in the said patent and deed to the said the Hon. and Rev. J. S., Rector of St. James, and his successors in the said rectory forever as a corporation sole, to and for the same uses and upon the same trusts as are mentioned and expressed in the said patent and deed.

The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent on the 16th February, 1847, and was in possession of the said lands, and in receipt of the rents and profits thereof until the time of his death, which happened on the 20th March, 1882.

In the year 1866 the statute 29 & 30 Vic. c. 16, entitled, "An Act to provide for the sale of Rectory Lands in this Province," was passed by the Parliament of Canada, which gave the Incorporated Synod of any Diocese of the United Church of England and Ireland in Canada, or the Church Society, with the consent of the Synod where the Synod was not incorporated, "full power and authority to sell and absolutely dispose of any lands granted by the Crown in such Diocese, as a glebe of, or as appurtenant or belonging to, or appropriated for, any rectory of the said Church in such Diocese, by whatever name the same may be called, or in whomsoever the title thereto may be vested."

In a suit brought by the incumbents of several rectories which were subsequently erected in the said city of Toronto, and the Synod of the Diocese of Toronto, to have the lands covered by the patent of 1820 and the deed of 1825 divided up under the provisions of that Act, it was

Held, (affirming the judgment of FERGUSON, J.,) that the lands in question were covered by the terms of the Act: that prior to the year 1866 there were Rectory Lands derived directly from the Clergy Reserves, and lands specially granted to trustees, which were treated as endowments for rectories, and that the Legislature intended to deal with both classes: that the delivery up and cancellation of the patent of 1817, being to correct an error, could not be held to be such a consideration as would make the patent of 1820 a grant for value: that Crown grants which were of a *quasi* public character were different from private gifts, and the Synod, in the case of the former, had petitioned for and obtained the power they desired: that 14 & 15 Vic. c. 175, s. 2, (C. S. C. c. 74,) afforded strong evidence that prior to the year 1866 there had been endowments for rectories out of the public domain, as well as out of the Clergy Reserves.

After the hearing and before the appeal was argued, a motion was made to strike the case out of the list, on the ground of maintenance, and it was shewn that the defendant, the Rev. J. P. D., did not wish to proceed with this suit; but that as he was pressed to do so by his Vestry and Churchwardens, he allowed his name to be used as appellant upon being indemnified by the latter as to costs.

Per BOYD, C.—There was maintenance in the suit though not in the criminal sense, and the case should be struck out.

Per PROUDFOOT, J.—There was no maintenance.

The decree of FERGUSON, J., was, however, varied by allowing the costs of all parties up to the hearing to come out of the fund.

THIS case (reported *ante* p. 499), having been set down to be argued at the autumn sittings of the Divisional Court by way of appeal from the judgment of Ferguson, J., a motion was made to the Court on behalf of the defendant

Dumoulin to strike the case out of the list on the ground that the appeal, although made in his name, was not being proceeded with on his behalf or in his interest, but by the churchwardens and others who were acting against his will, and who had no such interest in the matters in question in the suit as to give them the right to intermeddle with the pending legislation.

The motion was argued at length on September 10th, 1884, before Boyd, C., and Proudfoot and Ferguson, JJ., and many authorities on the subject of maintenance were cited.

MacLennan, Q. C., and *Moss*, Q. C., for the motion.

C. Robinson, Q. C., *S. H. Blake*, Q. C., and *Howland*, contra.

Judgment was reserved, and subsequently, on December 18th, 1884, delivered by the Chancellor as follows :

BOYD, C.—I have devoted some time to a consideration of the facts and the law pertinent to the application to strike out the cause from the list on the ground of maintenance. I have reached a conclusion which it would be easy to formulate into a judgment; but it is more in the interests of both parties that a decision should not be given on this application until the whole of the appeal has been argued. To decide upon this application involves to a certain extent the determination of some of the main questions in the action, and as the case is certain to be appealed whatever judgment may be given by this Court, it is preferable that the whole action both on this preliminary question and upon the merits should be disposed of in one judgment from which the appeal can be taken.

Such a course will facilitate the ultimate disposition of this action, and will enable the litigants to enjoy the fruits of success sooner than by a partial adjudication.

The costs of the present motion will be reserved till the determination of the appeal.

The appeal having stood over, then came on before the Divisional Court, and was argued on December 18th and 19th, 1884, before Boyd, C., and Proudfoot, J.

H. Cameron, Q. C., Maclellan, Q. C., and Moss, Q. C., for the plaintiffs.

Howland and H. D. Gamble, for the defendant Dumoulin.

A. Hoskin, Q. C., for the Township Rectors.

E. D. Armour, for the defendants Darling and H. G. Baldwin.

Howland. "The Parsonage or Rectory of St. James" was constituted by a patent from the Crown, issued January 16th, 1836; and the same patent granted, as an endowment to the Rectory thus constituted, 800 acres of land out of the Clergy Reserves situate in the Township of York.

Previously to that Rectory, called in the patent "the first Parsonage or Rectory within the Township of York," or "the Parsonage or Rectory of St. James," being constituted and endowed by the foregoing patent of 1836, the Church of St. James, in the Town of York, had acquired from the Crown certain other lands not granted out of the Clergy Reserves. These lands are claimed by the plaintiffs as being Rectory lands, and within the statute 29 & 30 Vic. ch. 16, entitled "An Act to provide for the Sale of the Rectory Lands of this Province." The defendants, on the contrary, claim that as the lands granted previously to the patent of 1836 were not given as an endowment of, or as appurtenant to, the Rectory, but as appurtenant to the Church of St. James, for the benefit of its parishioners, they are not within the terms or intention of the Act.

The Act of 1866, 29 & 30 Vic. ch. 16, is a private Act. It was passed (as appears by the preamble) upon the petition of the Provincial Synod of the United Church of England and Ireland in Canada. The Church of England was a private religious society in 1866: *Dunnett v. Forneri*, 25 Gr. 199; C. S. C., ch. 25, s. 4. The Act must therefore not be extended beyond the general property of the Church

of England with which the Provincial Synod had power to deal: C. S. C., ch. 74; *Dwarris* on Statutes, 650, 651; *Dawson v. Paver*, 5 Hare 434.

The Provincial Synod had power to deal with the property owned by the Church of England as a body, but had no power to interfere with the private endowments annexed to local churches. Parliament, in previous cases both in England and in Canada, has always required the assent of the local vestry to any Act affecting such local endowments: *Cripps's Law of the Clergy*, 215; *Smith v. Martin*, Rowe's Reports of Interesting Cases, 365; *Rector and Churchwardens of St. John v. Parishioners*, 2 Rob. Eccl. Rep. 515; *Blunt's Church Law*, 323; 23 Vic. ch. 147; Temporalities Act, 1841, secs. 2, 15; Old Revised Statutes, vol. 1, Public Acts, p. 1087.

The Provincial Synod certainly did not represent the vestry of St. James. The vestry had no direct representative in that body. The vestries send representatives to the Diocesan Synod, but the local property of a church cannot be bound by the Diocesan Synod; still less by the Provincial Synod, composed of delegates elected from various Diocesan Synods.

The endowments of rectories out of the Clergy Reserves constituted a class of lands to which the Act properly applied. They were the property of the church as a whole, for the support of the clergy, and not appropriated for the benefit of any single local congregation: Constitutional Act, 1791. 31 Geo. III. ch. 31, secs. 36. to 40. The power of resuming and redistributing these grants was expressly reserved by Parliament: Constitutional Act, sec. 41; see also 37 Geo. III. ch. 14; and also implied by the Rectory Patents granting rectory endowments pursuant to these powers. See patent to Rectory of St. James, 1836, which has no *habendum* and reserves the power to the Crown to constitute additional rectories in the same township.

These Clergy Reserve lands granted to Rectories were well known as the Rectory lands, and those granted in

Upper Canada particularly had been subject to a long parliamentary and judicial controversy. C. S. C. ch. 74, sec. 3, referred the question of validity of these granted in Upper Canada to the Courts. The Attorney-General declared in the information that the only endowments granted to Rectories down to 1852, were granted by the patents of 1836. The judgment of the Court confirmed this, and thus reported to Parliament that the only Church endowments in Upper Canada which answered to the description of endowments of Rectories were those granted out of the Clergy Reserves by the Patents of 1836: *Atty. Gen. v. Grasett*, 5 Gr. 412, 419, 421, 449, 455. It was expressly declared that Rectories could only be endowed out of the Reserves, p. 452. This finding would exclude the lands in question.

The preamble reciting that "the Provincial Synod of the United Church of England and Ireland in Canada have by their petition prayed for the passing of an Act to give permission to the Incorporated Synods and Church Societies of their said Church in this Province to sell the Rectory lands held in such dioceses by grant from the Crown," must *prima facie* have reference to some certain class of publicly recognized endowments. There is also evidence of departmental usage confining the term Rectory endowment to these Clergy Reserve grants.

The preamble will have weight in controlling the construction of the body of the Act in consequence of the Act being a private Act. A private Act is very much of the nature of an instrument *inter partes*: *Dwarris on Statutes*, p. 650. Private Acts, therefore, should be construed upon much the same principles as solemn private deeds of grant or covenant. The preamble, like the recitals in a deed, sets forth the parties upon whose application and for whose benefit it was asked, and to whose property it should be confined.

The Legislature in drafting the Act had the Act C. S. C. ch. 74 and the legal proceedings under it, in mind. As originally enacted, sec. 6 of the Act of 1866 read as

follows: "This Act shall apply only to those Rectories and rectorial lands that come within the provisions of the Act passed in the session held in the fourteenth and fifteenth years of Her Majesty's reign, chaptered one hundred and seventy-five." That Act was the C. S. C. ch. 74, and the reference was clearly to the third section. This sixth section was immediately afterwards repealed, but it throws light upon the sense in which the general terms were used in the preamble and enacting clause at the time.

The language, both in the preamble and in the body of the Act, has peculiar reference to the Clergy Reserve Grants of 1836, referred to in *Atty. Gen. v. Grasett, supra*, and in C. S. C. ch. 74. "The Rectory lands *held* by grant from the Crown" refers to the language of the Rectory patent of 1836, which gives the land only to be *held*, and contains no *habendum*.

The enacting clause empowers the Synod to sell "any lands granted by the Crown in such Diocese, as a glebe of, or as appurtenant or belonging to, or appropriated for any Rectory of the said Church in such Diocese, by whatever name the same may be called, or in whomsoever the title thereto may be vested." The words "granted by the Crown as a glebe of or as appurtenant to" are the precise words of the Rectory patent of 1836, and are not found in the patents of the lands in question. The words "or appropriated for any Rectory" would equally refer to the form of grant in the patent of 1836, which was peculiar, viz.: "We do hereby command that there shall be from henceforth and forever set apart from and out of the lands which we now hold in our said Province * * certain parcel * * to be held appurtenant with the said Rectory."

By the Constitutional Act, 31 Geo. III. c. 31, the lands were in terms appropriated to the support of the clergy in the Province: by the Rectory patents the lands were further appropriated to township clergy, and the form of the patent of 1836, as quoted, was rather that of an appropriation than of a grant.

The Church of England was not a part of the Constitution of Canada, or otherwise than a private religious society, assisted to the specific extent provided by the Constitutional Act: *Dunnet v. Forneri*, 25 Gr. 199, C. S. C. ch. 74. C. S. C. ch. 25, sec. 4; *Chitty* Prerogative of the Crown, pp. 29, 32, notes; *Re the Bishop of Natal*, 11 J. N. S. 353; *Stuart v. Bowman*, 2 L. C. R. p. 369, 3 L. C. R. p. 309; *Wilcox v. Wilcox*, 8 L. C. R. 34; *Hall v. Campbell*, 1 Cooper, 208.

The law of the Church of England, and the terminology of English law relating to it, had not therefore been imported as a part of the law of Canada. The words in 29 & 30 Vic. ch. 16, descriptive of the lands to be affected, must be read as having reference to or being a quotation of the language actually used in the patents granting the endowments, or in the Statutes of Canada or Imperial Statutes relating to Canada affecting the subject. There was no construction of common law known to the Parliament of Canada, defining such a term as "glebe," That and similar terms of description must have been adopted in the Act of 1866, strictly as descriptive quotations from the patents granting the lands intended to be affected.

The word "Rectory" was introduced into Canadian Law by the Constitutional Act as a term descriptive of the corporate office of Rector. The Act provides, first, a reserve of lands for the support of a body of clergy; next, for the constitution or erection of the Rectories by patent from the crown; then for their endowment by appropriating part of the clergy reserves, to be held appurtenant to them; and finally for filling the offices thus constituted and endowed by the appointment of incumbents: *Atty.-Gen. v. Grasett*, 5 Gr. 430, 454, 455. The words "erect and constitute," are the apt words for the creation of an office by Royal Patent: *Chitty's* Prerogative of the Crown, p. 85. Ministerial offices might thus be first constituted and officers afterwards appointed to fill them *Chitty*, p. 80. And upon no other construction than as appurtenant to an office so created could the endowment

of the Rectories, without naming any person to receive the grant, have been reconciled with the principles of English law. This is the strict effect of the word "Rectory," *Worcester's Dictionary*; *Tomlins' Law Dictionary*, Article "Parsonage"; *Phillimore's Eccl. Law*, 261, 272, 273, 291; *Smith's Real and Personal Property*, 3rd ed. 620. Parsonages even in England were originally mission establishments supported out of a central fund independent of any specific parish: *Phillimore*, 263. Vague popular usages had grown up in England connecting the term with the parish to which the office of rector was by later practice annexed, and also of applying it to the parsonage house: *Brown's Law Dictionary*, Article "Rectory." But the framers of the Constitutional Act used the term strictly with reference to the office.

It expressed precisely the establishment they proposed to introduce into Canada to suit the needs of a new country. The patents of 1836 recite the object as being to provide for the instruction of the inhabitants of the Townships.

The Rectory could not be confounded with any Parish. A Rectory might exist without a Parish: *Atty.-Gen. v. Grasett*, 5 Gr. 455. As the Parish therefore was not to be merged in the Rectory which might be constituted within it, neither could the churches or parish endowments annexed to them become confounded with the Rectory endowments, even should both happen to become vested in the same person. The evidence shews that this statutory distinction between Rectory and other endowments had been adopted in legislative official departmental usage, C. S. C. ch. 74: *Atty.-Gen. v. Grasett*, 5 Gr. 412; Church Temp. Act, *supra*, sec. 16.

Reading the whole of the descriptive language of the Act by the light of the preamble, and taking into consideration the fact that it was a private Act, and that the foregoing statutes and judicial opinions were before Parliament at the time, an implication is created as to the sense in which Parliament used the terms, that is to say, as

descriptive of these lands granted as Rectory endowments out of the Clergy Reserves pursuant to the Constitutional Act, and which precisely answer the description of property held for the beneficial use of the Church at large, and which therefore the Church at large on its petition might properly be given power to deal with. The implication is not removed by the mere repeal of the express declaration putting the intention beyond all doubt. Still less can it be held that by mere implication from the repeal of the original 6th section, the meaning of the remaining words of description is enlarged so as to cover the lands in question in this action. Those lands were not granted for the endowment of the clergy out of a general fund provided for that purpose, but were particular donations for the benefit of the local church and its congregation.

The trusts of any grants not made pursuant to the provisions of the Constitutional Act, such as gifts whether from the Crown or from private individuals to local congregations, are to be construed on the same principle as gifts to other private religious societies or congregations, namely, according to the form of the grant.

The parcel in the patents of 1817 and 1820 was clearly intended for the benefit of the congregation; the lands had, by the original patent of 1817, been given expressly to the use of the parishioners as appurtenant to the Church. By the reissued patent of 1820 the churchyards were granted to trustees for the parishioners, and the rest of the land was to remain appurtenant to the Church. The maintenance of a resident clergyman was a mode of enjoyment by the parishioners, and the whole object and effect of the surrender and reissue was merely to vary the mode of enjoyment by the congregation. It was not intended to take the lands away from the local Church and make them appurtenant to a township Rectory, subject to resumption and redistribution: Constitutional Act, 31 Geo. III. ch. 31, sec. 41.

The appointment by the Order in Council of 1825 to the use of the Church created a vested interest in the

congregation: *Bishop of Cape Town v. Bishop of Natal*, 6 Moore, P. C. N. S. 203. The trustees who held subject to any appointment by the Crown were bound by the trusts of such appointment when made. Their ministerial act in making a conveyance must be read consistently with the direction they purport to follow, as can be done by giving effect to the words declaring the lands to be appurtenant to the Church.

To enlarge the meaning of the words in the Act so as to include the lands in question in this action, would give a meaning to the words descriptive of rectory endowments inconsistent not only with that in which they were first inserted in the Act, but with the whole previous legal usage in Canada; would over-rule the declaration of the Courts in *Atty.-General v. Grasett*, *supra*, to the effect that no rectory endowments had been granted in Upper Canada except by the patents of 1836, and would take away grants held upon a peculiar title in which the local parishioners had an interest, although they were not represented. Finally, such a construction would divest the parish of property which had been acquired for valuable consideration, although the Act indicates an intention to exclude property so acquired.

The preamble of the Act speaks of the subject matter of the Act as the Rectory lands held by grant from the Crown. This peculiar language had reference to the Rectory endowments pursuant to the Constitutional Act, being voluntary appropriations over which the Crown possessed a legal and equitable right of re-appointment.

There was as much reason for excluding lands acquired from the Crown for valuable consideration as there was for excluding lands acquired from private individuals. The words used were intended to limit the application of the Act to lands granted or given by the Crown as glebe, &c., or appropriated (by the Crown) for a Rectory. The mentioning of the object of the grant shews that lands acquired for other considerations were excluded. The lands in question in this action were grants for valuable consideration.

Considerations for the patent of 1820 appear upon its face. The previous patent had been a complete and effectual gift to the trustees for the benefit of the parishioners of the Church. If the new patent can be construed as a patent for a Rectory then it is for the benefit of a new beneficiary, and if the surrender by the trustees upon which it was granted was a valid and effectual surrender, then the new patent clearly issued in consideration of that surrender. The surrender was made for the purpose of obtaining the new patent, and had the officers of the Crown, after accepting the surrender, refused to grant a new patent the performance of the understanding could have been directed upon petition of right. The right to a new patent in consideration of the acceptance of the surrender of the former one was thus a right which could be enforced, and brings the new patent, when issued, within the definition of a grant for valuable consideration as distinguished from voluntary conveyances: *May on Voluntary and Fraudulent Conveyances*, 244.

The lands granted by the Order in Council of 1825 were also acquired for valuable consideration, as was established by the Court of Appeal some years before the Act of 1866 was passed: *Atty-Gen. v. Grasett*, 8 Gr. 130. The decision must be deemed to have been in the knowledge of the Crown and Parliament in 1866, and when they were passing an Act in terms which were intended to exclude endowments acquired for valuable consideration they could not have intended that these lands should be affected by it.

The repealing Act was in the following terms:—

“The sixth section of the Act passed in the present session of the Parliament of this Province, intituled ‘An Act to provide for the sale of the Rectory lands in this Province,’ is hereby repealed, and the following section shall be and is hereby substituted in lieu of the said section hereby repealed, and shall be taken and read as the sixth section of the said Act:—‘6. This Act shall not apply to any lands granted by the Crown as sites for churches, parsonages, or burial grounds, or now occupied as such.’”

As the amending Act was framed in the very same session as the Act it amends, the presumption against an intervening change of mind is almost irresistible. The intention of the amendment was to better define the meaning originally intended to be expressed.

The intention as recited in the preamble to the principal Act was to empower the petitioners to sell the Rectory lands. The directions for the redistribution of the proceeds of such sale pursuant to the power reserved to the Legislature by the Constitutional Act is a mere incident of such sales, as we see from the fact that it does not extend to unsold lands. We gather that the actuating spirit of the petition, and of the statute granting its prayer, is, that the Church of England in Canada may get a better revenue out of its unproductive clergy lands by selling them, and so be able to support its clergy better or to support more of them.

No lands dedicated or in use as sites for churches, parsonages or burying grounds, would properly fall within these objects; but in *Atty-Gen. v. Grasett*, 8 Gr. 132, it was stated that in the case of the Rectory of Montreal the site of the church had been granted in and by the Rectory Patent. It is also not improbable that in the other instances the rectors had suffered a portion of their glebes to be used by the parishioners as sites for churches or churchyards. Parsonages also, being generally built upon the glebe or rectory land, would have been, but for the exception mentioned in this section, subject to be sold under the operation of the Act as originally passed.

The amendment thereof seems to have been a proper if not a necessary one to reduce the operation of the Act within the limits consistent with its true spirit. This effect is plainly to further limit the Act by extending the exceptions. It would be most improbable that the amendment was intended to enlarge the operation of the Act in other directions.

With the Act of 1851, C. S. C. C. 74, and the findings in *Atty.-Gen. v. Grasett*, 5 Gr. 412, before it, the Legisla-

ture of 1866 must have been convinced that there were no other Rectory lands in Canada except those of 1836 in Upper Canada and the Montreal Rectory in Lower Canada upon which those terms used in the preamble and body of the Act could operate.

The case of *Lyster v. Kirkpatrick*, 16 Gr. 17, was not before the Legislature at the time the Act of 1866 was passed, so that case and the law decided in it could not have assisted the Legislature as to what was meant by the words "Rectory lands." That case was decided after the Act was passed, and that question was not before the Court.

At the conclusion of the argument, judgment was given by the Court without calling on the other counsel.

December 19, 1884. BOYD, C.—We have now had the benefit of the argument, in which Mr. Howland has presented his side of the case from nearly every point of view, as well as the benefit of the printed argument with which we were furnished previous to the hearing of yesterday and to-day, and we are thus enabled to dispose of the case at this stage.

The shape of the defence is somewhat different from that before Mr. Justice Ferguson. Mr. Howland's contention is, upon the construction of 29 & 30 Vic. c. 16, intituled "An Act to provide for the sale of the Rectory lands in this Province," that the lands in question in this suit do not come within the Act. He contends that they are not embraced in the words "*the* Rectory lands." I do not think that the solution of the difficulty can be arrived at by any mere verbal criticism such as that, nor do I think it would make any difference if the word "the" were omitted.

The first clause of the Act gives "full power and authority to sell and absolutely dispose of *any* lands granted by the Crown * * , as a glebe of, or as appurtenant or belonging to, or appropriated for, any Rectory of the said Church * * , by whatever name the same may

be called, or in whomsoever the t
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made appurtenant to the Rectory, and the other part was set apart for church and churchyard. The part not appropriated for the clergyman will not be interfered with by this decision.

Next as to the patent of 1819. That was a grant from the Crown to trustees to dispose of as the Crown might direct. Afterwards, by an Order in Council it was for the use of the church and the clergyman for the time being. That did not mean that it was for the parishioners but for the clergyman, and the deeds of the 4th July, 1825, from one set of trustees to another, provides "that whenever our Governor, Lieutenant-Governor * * shall erect a Parsonage or Rectory in the said town of York, and present to such Parsonage and Rectory an incumbent or minister of the Church of England * * the said trustees *

* shall, by instrument in writing * * transfer and convey all the said parcels or tracts of land and premises hereby granted to such incumbent or minister * * as a sole corporation, to and for the same uses and upon the same trusts as are hereinbefore mentioned and expressed," &c. This was afterwards done in the year 1841, and the lands were vested in the then Rector, the late Bishop Strachan, and were an endowment of the Rectory, and are embraced under the Act.

Under the Church Temporalities Act, any private benefactor might give in what manner and upon what conditions he chose, but the Crown Grants were different as being of a *quasi* public character, and the Synod thought they should have power to deal with the latter, and for this reason they petitioned and procured the Act of 1866, which gives them the power they desired. The second clause of 14 & 15, Vict. ch. 175, (ch. 74 C. S. C.) which enacted in these words: "No Letters Patent shall be hereafter issued in this Province by the Crown for the erection of any Parsonage or Rectories, according to the establishment of the Church of England, or for the endowment thereof out the Clergy Reserves or *public domain*, or for the presentation of an Incumbent or Minister to any such Parsonage or

Rectory " affords strong demonstration that prior to 1866 there had been endowments for Rectories made out of the public domain as well as out of the Clergy Reserves.

Then, as to the question of maintenance. My own view is, that there has been maintenance in this action, not in the criminal sense; but the vestry and churchwardens have so intermeddled in the litigation that their conduct savors of maintenance. Such interference is excused in certain cases of blood relationship between the parties, which does not exist here: and sometimes where a rich man interferes to aid a poor one; and where there is a common or joint interest in the party to the record and those who assist him. *Bradlaugh v. Newdegate*, 11 Q.B.D. 1, is the last important case on the subject; its whole scope is not in any sense to relax the law, but rather to assert its stringency in cases like the present. The essentials which go to justify maintenance I do not find to exist for the protection of the vestry and churchwardens in this appeal.

The defendant was not willing to go on, and would not have prosecuted this appeal if he had not been incited so to do, and had not been indemnified against costs by the churchwardens, who are not parties to the record. Their interest and that of the vestry under the patent of 1817, as they allege it, is outside of the defendant Dumoulin altogether. It is not a common but an antagonistic interest. At present he claims the land for himself and his successors beneficially—they claim it beneficially as against the Rector. Such is also their relative position as to the other patent. As to neither is there the common interest which justifies maintenance, and the success of the defendant would not in law benefit the churchwardens.

To give effect to the contention of the churchwardens, it would be necessary to recast the record. The Rector should have said, "I am a mere trustee for my parishioners; bring in the beneficiaries and make them parties"; but this he did not do or say, because he relied on and defended in his own right merely and entirely. I think the motion to strike the case out of the list should have succeeded. The

Court should not allow strangers to come in and promote this appeal when the defendant did not wish it. But as I understand my learned brother Proudfoot does not agree with me on this point, I will say nothing as to the costs of that part of the case at present. On the merits the judgment below was correct, except that I think it was a fair subject for litigation up to the hearing; and as there is a fund in dispute, I am disposed to allow the costs of all parties up to (and inclusive of) the hearing to come out of it, but the costs of the appeal should be borne by the defendant.

There will be no costs of the motion to strike the case out of the list.

PROUDFOOT, J.—As to the last point mentioned by the Chancellor, I do not think the churchwardens can be held liable to the objection of maintenance. Maintenance is defined or described as an officious intermeddling with a suit, which no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend. But the doctrine cannot be applied to a person having an interest, or believing that he has an interest, in the subject in dispute, and *bond fide* acting in the suit. In the present case there were various ways in which the success of the defendant Dumoulin would be beneficial to them, and I have no difficulty in concluding that they believed they had an interest in the result of the action. But from the view we take of the case, the question is only of importance as affecting the costs of the argument of last term.

The principal question turns upon the true construction of the Act of 1866. It recites the petition of the Provincial Synod for power to sell rectory lands. The enacting part gives power to sell any lands granted by the Crown in the diocese as a glebe of, or appurtenant or belonging to or appropriated for any Rectory of the Church in the diocese.

The lands in question were granted before the erection of the Rectories. Those granted by the patent of 1817

were to be held by the trustees to and for the sole use and benefit of the parishoners and inhabitants of the Town of York for ever as a churchyard and burying ground of the inhabitants of York, and as appurtenant to the Church then built thereon; and it contained a proviso, that whenever a rectory was erected and a Rector appointed the trustees were to convey the land to him and his successors forever as a sole corporation for the same uses and trusts as were before mentioned.

This patent was surrendered to the end that the uses and trusts might be more particularly defined, the whole of the land not being required for a Churchyard and burying ground.

A new grant was made in 1820, which recited the former one, and the object of the surrender, and then re-granted the lands to the trustees, to hold a part of the land for the sole use and benefit of the clergyman of the Church of England, resident in York, and having care of souls therein, and his successors being clergymen of the Church of England, and appointed or to be appointed Rector, &c., and to hold the remainder for a churchyard and burying ground. And the proviso was repeated as to conveying to the Rector when a Rectory was established.

I do not think that the statute of 1866, in speaking of lands granted by the Crown, is necessarily confined to gratuitous grants. But this need not be determined, for I think the surrender of the grant of 1817, for the purpose of having omissions supplied, cannot be considered as a valuable consideration for the grant of 1820. It was surrendered for a particular purpose, and the grant of 1820 was to accomplish that purpose. It was intended to take the place of the former, and was as gratuitous as it was.

Whenever a rectory was established and an incumbent appointed, he had a right to call for a conveyance from the trustees. He became the *cestui que trust*.

In 1836 the Rectory of St. James was erected, and subsequently an incumbent appointed; and in 1841 the trustees conveyed to him.

These lands then became Rectory lands, held by grant from the Crown, in the language even of the recital in the Act of 1866, and certainly in the enacting clause of that Act. The recital may be used to construe or limit an ambiguous clause in the enacting part of a statute, but cannot control its operation when the words are plain. Here the recital is a statement of what the petitioners asked for, but there was nothing to prevent the Parliament granting them ample powers.

It is possible that when erecting rectories the endowment might require to be taken from the Clergy Reserves. But that could not interfere with the power of the Crown to make a gratuitous grant for the maintenance of a particular congregation, as such a grant might have been made to an individual.

But I need not pursue the subject further, as I agree with the Chancellor in what he has said.

G. A. B.

[CHANCERY DIVISION.]

NIXON V. ASHENHURST.

Will—Dower—Election—Express provision in will—Evidence.

Where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the benefits of the will as well, much less dealing with the property left to her, will evidence an election on her part to take under the will, than would be sufficient in the absence of such express provision.

Held, in this case, that, there being such provision, the evidence set out below was sufficient to establish an election to take under the will, though otherwise it would not have been.

THIS was an action of dower, and was brought by the plaintiff as widow of James Nixon, who died seized and possessed of the south-west half of lot No. 11 in the 7th concession of the township of Esquesing, to recover her dower in the said land.

The defendant by his statement of defence admitted that the plaintiff was the widow of James Nixon, and that he died seized of the land in question, and alleged as a defence to the plaintiff's claim that Nixon by his last will and testament devised to the plaintiff for life the house in which he then dwelt, with sufficient furniture for her use, also \$100 per annum, payable half-yearly, the first half-yearly payment to be made to her at the expiration of six months from the testator's death, also one cow, together with six cords of wood annually prepared for the stove, the cow to be kept for her use free of expense winter and summer by testator's son Richard Nixon, also the fuel, all of which were to be in lieu of dower; and that the testator by his will devised certain other lands and premises to the said Richard Nixon, and declared that the payments and provisions in his said will for his wife in lieu of dower should be a lien upon the land so devised to the said Richard Nixon, who accepted the devise: that the plaintiff after the death of her husband remained in possession of the dwelling house and furniture and elected to accept the said

bequest in lieu of her dower: and that the said James Nixon devised the lands and premises out of which dower in this action was claimed to the testator's son William Nixon, who subsequently conveyed the same to the defendant free and clear from all dower and other incumbrances.

The defendant, in his statement of defence, also alleged that after the said conveyance to him he had mortgaged the land to one Joseph Graham for \$3,000, and to the said William Nixon for \$500, which last mentioned mortgage came by several mesne assignments to one George S. Goodwillie, and claimed that Goodwillie was a necessary party; but by consent of the parties it was arranged that the only question for the decision of the Court should be, whether the plaintiff had elected to accept the provision made for her by her husband's will in lieu of dower.

The action was tried at Brampton, on March 11th, 1884, before Cameron, J.

It was proved that the plaintiff's husband died seized of a considerable quantity of land besides that in question, and that the plaintiff's dower in such lands would have been of more value to her than the provision made for her by her husband's will. It did not appear that she had ever in express terms agreed or assented to accept such provision in lieu of dower, but the defendant contended that was to be inferred from her conduct. It appeared that she and two of her sons continued to live together on the homestead that she kept house pretty much in the same way as she had done before her husband's death: that the homestead, with some other lands were devised to her son Richard, but subject to the payment of the testator's debts, funeral and testamentary expenses, and the bequests and legacies contained in the will: that the plaintiff and two sons resided on the homestead for about two years: that after the funeral the will was read to her, and she made no objection to the provision in her favour: that without receiving any consideration for so doing, she had joined her son Richard for the purpose of barring her dower in certain mortgages he gave upon the lands devised to him: that after her son

gave these mortgages she left the homestead and went to live with her son Charles : that she received money to about \$100 from her son Richard and also \$50 from a Mr. Murray, advanced by him for Richard; and she gave the following evidence : "I knew about my husband's will, I did not accept the provision made for me by the will ; I told them and others I would not take it ; I got nothing except a living in the house ; I didn't get the wood or cow : * * I knew the law would give me my thirds. The executors came to the house after the funeral, the will was read over, I didn't say any thing ; I knew my husband had given me that in the will ; I didn't want to go against the will ; I got money from Mr. Murray ; I sent for Richard, and when he came he gave me money ; I didn't want dower of Richard's farm ; I didn't want any dower of Ashenhurst's farm till he bought it. * * I signed mortgages on Richard's place, to give up my dower ; I was relying on Richard that he wouldn't see me want ; I wouldn't have gone to law with William ; I never went to Ashenhurst to claim dower."

Milligan, for the plaintiff. The plaintiff's claim is a legal right. There was an absolute right of dower. The evidence of election must be explicit. I refer to *Coleman v Glanville*, 18 Gr. 42 ; *Wilson v. Wilson*, 6 O. R. 177 ; *Baker v. Baker*, 25 U. C. R. 448 ; *Cooper v. Watson and Tracy* 23 U. C. R. 345 ; *Reynard v. Spence*, 4 Beav. 103.

J. Laidlaw, for the defendants, referred to *Gretton v Haward*, 1 Swans. 409.

May 1st, 1884. CAMERON, J.—[After stating the facts as above].

If the question to be determined was, whether the plaintiff had elected to take the provision made for her by the will in preference to dower, in the absence of a distinct declaration in the will that the provision was in lieu of dower, I am of opinion the evidence would not have been sufficient to establish such election according to adjudged cases. But the question of election is one of fact, and must be determined in each

case according to the special circumstances presented therein, and I am of opinion where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the provision of the will also, much less dealing with what is left her, will evidence an election on her part, that would be sufficient where the sole question was, whether she had elected to take the provision made for her by the will, when such provision, according to the principles of equity, would be inconsistent with an intention on the part of the testator to let her have such provision and dower also.

As a matter of fact, in the present case, I have no doubt whatever that the plaintiff fully understood what the will gave her, and that what she was so given disentitled her to dower, and that she lived on the homestead, though her sons were with her, and regarded it as hers, and the money she received from her son, and from Murray, she received in part performance of her son's obligation to pay her her annuity. I am of opinion her sons, who seem very rapidly to have got rid of or so encumbered their property as to be greatly embarrassed, induced her to make her claim for dower, and this action is rather their action than hers. I shall therefore find, as matter of fact, that the plaintiff accepted the provision made for her by her husband's will in lieu of dower. If the distinction I have made between the case of an election in accordance with the rule in equity and an express provision in a will in lieu of dower is not sound, my decision will be quite at variance with *Coleman v. Glanville*, 18 Gr. 42; *Cooper v. Watson and Tracy*, 23 U. C. R. 345; *Baker v. Baker*, 25 U. C. R. 448, and the English authorities, and cannot be supported, but it seems to me the distinction is sound and entitles the defendant to succeed.

Mr. Laidlaw contended on the authority of *Gretton v. Haward*, 1 Swan. 409, that if the plaintiff is entitled to dower, the defendants are entitled to have the provision made for her under the will, and charged upon the lands

devised to Richard Nixon, assigned to them to protect them against loss through the plaintiff's claim. All I am at present disposed to say as to that is, the statement of defence does not present any such case, and the proper parties are not before the Court to determine it. But assuming the plaintiff's right to dower has been established, she is entitled to dower in Richard's lands as well as in the land of the defendants derived through William Nixon, and Richard could not be made subject to the widow's dower in his own land and to making good to William or his assigns the obligation imposed upon his land upon the supposition that such land would be exempt from dower, and the just equity which applied in *Gretton v. Haward*, may have no place in the circumstances presented here.

The plaintiff's action must be dismissed, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

DONALD ET AL. V. DONALD ET AL.

*Will—Construction—Parent and child—Maintenance of infants—
Reference—Practice.*

A testator willed as follows: "I give, devise, and bequeath to my executor and executrix," (of whom one was the plaintiff, the testator's widow) "all my real and personal property of every kind whatsoever, for the benefit of my children, share and share alike, and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my children and my wife while she remains my widow."

Held, in an action brought by the widow, that, under the above will, she and the children took the real and personal property jointly, she during widowhood, and they share and share alike absolutely; that she did not take an immediate estate in the whole with reversion to her children.

Held, also, that a reference might be directed similar to that in *Maberley v. Turton*, 14 Ves. 499, to ascertain whether it would have been reasonable and proper in the trustees to apply any or what part of the land, having regard to the situation and circumstances of the children, to their support and maintenance, and a declaration made that the sum which the Master should find to have been properly expended by the mother in past maintenance formed a charge upon the inheritance of the children respectively in the land, but as the directions of the will had not been observed, the enquiry must be at the expense of the mother.

THIS was an action brought by Jane Donald, widow of John Donald, deceased, and by her co-trustee under the will of the said John Donald, claiming to have the will construed, and other relief, as stated below.

The statement of claim set out that John Donald died on October 31st, 1870, leaving the will in question, dated the same day, which, after appointing one Inglis and the testator's widow, so long as she so remained, executor and executrix thereof, continued as follows:

"I give, devise, and bequeath to my said executor and executrix all my real and personal property of every kind whatsoever for the benefit of my children share and share alike, and to my wife while she continues my widow; and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my said children and my wife while she remains my widow. I give to my dear mother J. Logan the sum of \$50 a year, to be paid to her in half-yearly payments during her natural life. I give my wife, in the event of

her marriage, the sum of \$200 in lieu of dower. If my executor and executrix deem the payment to my mother more than my estate can bear, they may diminish the same in their discretion.

"Signed, sealed, etc."

The plaintiffs also set out that the testator died possessed of personal property of the value of \$100, and real property of the value of about \$2,000, but leaving unpaid debts to the value of \$500: that he left seven children all at the time of this action still alive, of whom the three defendants were under age: that the plaintiff Jane Donald supported, maintained, and educated the children and paid the debts to a large extent out of her own means, and for those purposes made large advances to the testator's estate, and that to make the real estate available she had erected substantial new houses thereon at a cost of about \$3,200, all of which, beyond a certain sum received as insurance money on the said buildings being burnt down, had been advanced by her out of her own means: that there was a large sum due to her in respect of such advances, for which she claimed a lien on the trust premises: that doubts had arisen as to the extent of the interest taken by her and the children respectively under the will, and she contended she took an estate *durante viduitate*. And the plaintiffs claimed to have the will construed; to have the estate administered; to have an account taken of the amount due Jane Donald, and to have the premises sold and the amount paid her; to have the amount due her declared a lien on the premises, and for costs of suit.

The defendants, by their guardian, delivered a statement of defence, alleging Jane Donald not entitled to be repaid the moneys alleged by her to have been expended for maintenance, inasmuch as before expending it she should have applied to the Court in that behalf: that as to the sums spent in erecting buildings she should be allowed only a sum equal to the enhanced value of the lands and premises; and that she was only entitled to one-fourth of the income of the estate for her maintenance, and that only during widowhood.

The action was tried at Kingston, on September 30th, 1884, before Boyd, C.

Walkem, Q. C., for the plaintiffs. We claim a declaration that the widow has an estate for life in the lands, with remainder to her children, and that the lands are charged with the moneys expended in maintenance and for debts and improvements. As trustee she is entitled to be refunded moneys advanced: *Lewis* on Trusts, 7th ed., p. 510 sq.; *Bevis v. Boulton*, 7 Gr. 39; *Life Association of Scotland v. Walker*, 24 Gr. 293.

Macdonnell, Q. C., for the infants. Any lien on the lands should be confined to the amount by which the property is enhanced in value by improvements: *In re Hunter*, 14 Gr. 680; *In re Brazil*, *Barry v. Brazil*, 11 Gr. 253. As to the construction of the will, see *Newill v. Newill*, L. R. 7 Ch. 253.

October 22nd, 1884. BOYD, C.—As to the construction of the will, I retain the view expressed at the hearing, that the mother and children take jointly the real and personal property disposed of by the will, she during widowhood, and they share and share alike absolutely. I do not read the will as giving her an immediate estate in the whole with reversion to her children, as contended by Mr. Walkem, *Newill v. Newill*, L. R. 7 Ch. 253.

The will contemplates the children being maintained out of the proceeds of the real estate, and gives power to the executor and executrix to sell for that purpose. This power has not been exercised, but the wife, as plaintiff, now claims to be allowed for her expenditure for past maintenance, although such expenditure has not been previously sanctioned by the Court. The case differs from *Edwards v. Durgen*, 19 Gr. 101, and *Kellar v. Tache*, 1 Ch. Ch. 388, by reason of the charge for maintenance imposed by the will; and though I do not favour such actions, it would not seem objectionable in principle to direct a reference in this case, similar to what was given

in *Maberly v. Turton*, 14 Ves. 499, it would have been reasonable and proper to apply any and what part of the land situation and circumstances of the case to find the sum which the Master found to have been expended by the mother in past and future charge upon the inheritance of the infants in such land. I do not conceal from you that it will be a difficult and expensive investigation to be conducted at the expense of the mother to ascertain her rights as against her executors and administrators. The provisions of the will have not been observed, and the Court should not impose upon the mother the burden of this inquiry. The infants' expenses should be paid by the mother, and if she is prosecuted, and a sale is found to be necessary, the costs may be added to the plaintiffs' charges. The mother will continue in the future to keep the property in her possession for the support of the family during their minority, and it is the duty of the Court to give them a start in life.

[QUEEN'S BENCH DIVISION.]

CONWAY V. CANADA PACIFIC RAILWAY COMPANY.

*Railways and Railway Companies—42 Vic., ch. 9, 46 Vic., ch. 24 (D.)—
Liability to fence.*

Held, O'Connor, J., dissenting, that under the Consolidated Railway Act 1879, 42 Vic., ch. 9 (D.), as amended by 46 Vic., ch. 24 (D.), the railway company are not bound to fence except as against a "proprietor or tenant" in occupation, and that the company are not liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him.

The meaning of the terms "Proprietor," "Tenant," and "Occupant," considered.

THE plaintiffs claimed compensation from the defendants for two horses, the female plaintiff's property, which were killed by a construction train of the defendants on their railway in the township of Ferris, on the 22nd of June, 1884. The claim was made upon the ground that the plaintiffs were the occupants of the east half of lot 29, in the 14th concession of that township, and that the defendants were bound to fence the line of their road as against her according to the 46 Vic. ch. 24, sec. 9 (D.), and its sub-sections, which repealed and amended 42 Vic. ch. 9, sec. 16 (D.), and its sub-sections, and that the company had not put up such fence.

The question was, whether the female plaintiff was an occupant of the land in question within the meaning of the Act.

The case was tried at the last Fall Assizes, at Pembroke, by Cameron, C. J., without a jury.

It appeared that the defendants, while constructing their road in that locality, put up some shanties for the accommodation of their men, and for their own purposes, and one of these shanties was used as a boarding house, the one which the plaintiffs claimed. The person who first kept the boarding house gave it up, and the plaintiffs went into it, and kept the boarding house about March, 1883, up to about November of that year. The female plaintiff said

she went on to the land in June, 1882, and her house, she said, was on the east end of the lot between lots 28 and 29, and they improved a little on the north side, and about an acre on the south side near the railway track, and that they cultivated what they could in 1883, she expecting then it was to be the defendants' land : that they went in there first as tenants of James Worthington, the manager of the construction work for the defendants : that the first three months they paid \$4 a month, and after that \$6 a month rent : that they paid him rent up to September, 1883, and two months later rent was paid to Salisbury, the paymaster of the defendants : that they had since paid no rent to anybody, the rent being deducted by the defendants from her board bill for boarding the men : that she afterwards heard from the assessor that Mr. Worthington gave up his claim to the land, and that she paid taxes on it, and she applied in May, 1884, to the Crown land agent in Mattawa for it : that a part of the house occupied by her was not built by the company, and that she paid the man \$8 for that part, which she used as a kitchen : that she continued in that house, which was on the concession road, till the last of June, 1884, and until after the horses were killed : that she then went into the house upon lot 27, where the station was built, and bought an acre of it : that she was not located for it, but for lot 26 : that she made the affidavit of 9th September, 1884, for the purpose of applying for the east half of lot 29 : that it was a mistake in the affidavit that she was located for lot 27 ; it should have been for lot 26 : that she was living on an acre she had of lot 27 : that she was located for 26 in the spring of 1884, and applied for it before her horses were killed.

The affidavit made by the female plaintiff stated she had seven daughters and no son, and that she was the head of the family, while she had a son who was then working on the road, and her husband was living with her. She said all that was the agent's mistake, for he knew she had a son. She said : " I got an assignment from Quirt about a week

ago, that is, on the 6th October, 1884." (It appeared the plaintiff shortly before the trial got a letter from her solicitor, telling her unless she could prove payment of taxes, or something of that kind, or title to the east half of lot 29, she could not recover in this suit.) "I applied in May, 1884, for the east half lot, and moved on to 27 about the last of June. I did not leave the east half of 29. I have over \$200 worth of things upon it. I did not expect boarders to walk up there when they are working further away now. I paid \$7 taxes for lot 26 in June, 1884, and \$3.90 I paid on east half of 29. The collector first came to me for the last sum on 27th September, 1884. At this time the station was at lot 29. There were as many as 50 occupants upon lot 29. The station moved away about a year ago. At the time I made the affidavit of 9th September 1884, I was living on lot 27, and was located for lot 26. Other persons were living on the east half of 29, at the time of that affidavit; and it was true, as I stated in the affidavit, that it was then unoccupied, so long as they did not want to claim the land. I did not read the affidavit, and it was not read over to me. It was laid down for me to read. I had no title at that time beyond the fact that I had been let into in the first place by the company into a shanty of theirs under a lease. The company only rented the house to me. I did not pay rent after November, 1883, because I had no boarding to do. If I had been asked for it I would have paid it till I owned the land. I thought I had the best right to it. I never understood Quirt to own the whole lot, nor to say as much. The proceedings of the 6th October, 1884, were had before Mr. Shannon, a magistrate, in my house, to get affidavits from Mr. Holliday and Mr. Dranley to prove they took the taxes from me as well as from Quirt, and I wanted it made out there was an error in paying the taxes. Holliday said Quirt had paid him between \$10 and \$11 for taxes. The whole country there is unfenced. It is a common. I thought in the spring of 1884 the east half of 29 was to be mine. I wrote the Crown land agent a letter

in May of that year about the land. I only wanted to notify him that I wanted to claim that land."

Alexander Dranley said he had two horses killed at the same time, and in the same way the plaintiff lost her horses, and his claim was, that he had the right from the plaintiff to feed his horses, by an agreement with her, upon the east half of lot 29. He said that the plaintiff asked him in 1884 for the number of the lot, and she made an application to the Crown Land agent to purchase it: that she was not assessed for it in 1884, but Mr. Worthington was: that Holliday, the collector, got the taxes from Worthington in 1882, 1883, and in 1884, having collected them from the plaintiff and from Mr. Quirt: that the assessment was \$100 for the whole of lot 29, and the rate was $2\frac{1}{2}$ cents on the dollar: that the taxes were \$2.50, which was the school rate: that the plaintiff paid \$3.90 for taxes, as per receipt of 27th September, 1884, which was given on October 6th, 1884: that he advised her to apply for the east half, and made the joint affidavit along with her, that she was the head of the family and had no son, and that the land was wholly unoccupied and unimproved: that he knew plaintiff had then located lot 26, and was then living on lot 27, and not living on 29: that she had potatoes and vegetables, and hay and oats on it: that one Bailey had a bit of garden on it, and was then cultivating it: that he got a letter from Mr. Gorman saying the plaintiff and he could not recover for their horses unless they showed some title to the lot: that he got it about the last of September, or the first of October: that one Rondy was living on lot 29 too, because he had no house on lot 24, which he had located.

For the defence, Robert Crookshank said that he was an employee of the defendants: that in June, 1884, there were several shanties on the east half of 29, and several persons were living in them: that the house the plaintiff lived in at the time of the accident, 2nd June, 1884, was 68 feet from the centre of the railway track: that there was not much clearing on it but the beaver dam meadow, and the right of way

of the company: that the plaintiff had a few potatoes and cabbages right down by the railway track: that there was no fence: that there were a few round poles: that the half of the clearing there was on the right of way.

George Quirt said that he lived on lot 29 in the 14th concession: that he went there on the 17th July, 1881: that he rented a house on it, and moved his family there in December of that year, and had lived there ever since: that he had ten acres cleared: that the plaintiff went there in March 1882: that she kept the company's boarding house, he helping to build it: that Worthington's men built it: that at the time of the accident there were "between houses and telegraph offices, and stores that were built and used as houses, and carpenter shops and blacksmith shops, close on a dozen houses:" that at that time he saw Frenchmen boarding themselves there, ten in a place, four in a place, and the whole place occupied by somebody more or less: that Rondy had potatoes there: that no one had cleared on that part of the lot, all the clearing there was taken for the company's buildings: that the clearing was made by the company: that four or five acres of it were cleared, enough for any farm for houses, and taken off. He said part of the clearing counted upon was the old track, which the company had cleared, and afterwards changed the track there: that he paid Holliday's taxes: that the taxes collected were school taxes: that he wanted last year [1884, apparently] \$15, and he would not pay it, but gave him \$11.08 for taxes, according to the receipt, on the whole of lot No. 29: that he paid that sum about two months ago: that if he had been able he would have paid the same last June: that after he paid the taxes he went to North Bay six miles off to work: that Mr. Dranley came for him the Sunday after that: that the plaintiff never cleared on the lot that he could see: that he claimed the whole lot: that he went to the land agent in April, 1884, when the lot came into the market, and told him he was living on it, and he said he was going up there, and he would see

about it, but he did not come: that a man came to North Bay to him a week ago last Monday [that would be the 6th of October], and said Shannon, the magistrate, and Mr. Conway, wanted him for something about the land: that he went down: that the telegraph operator said he was to be arrested for perjury: that he was sent for to Mrs. Conway's house and went: that Mrs. Conway said she was going to have a trial, and she wanted to give him fair play: that Mr. Shannon started to write something: that Mr. Halliday said about his receipts for taxes not being right, and they denied at last he had receipts for taxes: that he offered to go home and get them, and Mr. Shannon said no, they were not wanted.

In cross-examination he said: "I told Dranley I would make Mr. Conway pay for his horses and let my land alone. I told him I would pay him for his horses and run the risk of getting the amount out of Mr. Conway. I valued his horses at \$210. I never went into possession under Mr. Worthington. I paid taxes in 1882 and 1883. I paid taxes in 1883 on half an acre of the east end of the lot. I paid taxes on the whole lot in 1884. I told the assessor in February, 1883, to assess me for the whole lot, that I had made arrangements with Mr. Worthington for it. I said to Dranley the \$15 taxes for the whole lot was an extortion, and I would not pay that sum. He said, if I did not pay it, Mr. Conway would. I said, go to Mr. Conway and get it. I did not say I was liable only for the west half. I said let Mr. Conway and me have that out, and I will pay on the half lot and make no trouble, and it came to only \$1.50. Dranley said I would have to pay all the taxes. I met Halliday after that. He said: 'I am going to return you part of the taxes.' I said: 'Is that an overcharge?' and he reduced it from \$15 to \$11. The \$11 is an overcharge. I made my application two weeks ago to be located for this lot. I swore there was no one in adverse possession of any part of the lot. I considered no one but myself had any right. I swore the lot was wholly unoccupied and unimproved, only what I did myself, and

only this half acre of Mr. Conway's; after that I signed the agreement of the 6th of October. I have acknowledged Mr. Conway can have the east half. I said to Shannon, I would not sign a lie for him or any one." Q. "That is a lie, you have signed that? A. It is. I would not swear to it, but I would sign it to get out of the place. I would sooner lose 50 acres than to take 100 and live the way I have done there."

At the close of the evidence the learned Chief Justice found that the plaintiff entered into possession of a small portion of lot No. 29 in the statement of the plaintiff's claim mentioned, not exceeding two acres, under one James Worthington, who was a contractor for building the railway: that the land in question was part of the ungranted land of the Crown: that the greater part of the land in the neighbourhood was in a state of nature: that the plaintiff paid rent to Worthington for the house up to November, 1883, and since that time the plaintiff had made application to the Crown Lands Department to be allowed to purchase the lot, and that the Department had not as yet given any intimation to her as to whether she would be allowed to buy or not.

He also found that one Rangier was in possession of a small part of the lot, that George Quirt was in possession of part of the said lot, and claimed the right to become the purchaser of the same; and that since this action commenced, he and the plaintiff Catharine Conway had agreed to hold, she the east half and Quirt the west half of the lot: that the defendants were not guilty of any negligence other than the omission to fence their railway over the said lot of land. He found the value of the horses killed by the defendants' train to be \$300, for which amount they were entitled to recover, if under the circumstances the plaintiffs or either of them were or was such occupants of the land that the defendants were bound to fence their railway across lot No. 29 in the pleadings mentioned; and he found that the plaintiffs were not such occupants; and that the defendants were not bound to fence their railway

across the said lot; and he dismissed the plaintiffs' action with costs.

The shorthand reporter at the trial noted that the Lordship said at the time of giving judgment that he was by no means free from doubt that he put a proper construction on the clause: that the first part of the section 46 Vic., ch. 24, sec. 9, required the railway company to fence where any part of the land was occupied, no matter how small a part, while the latter part of sub-section only gave the right of occupation to the land in respect of which the fencing must be done; and the occupant of one acre was not the occupant of the whole lot, but only of part of it; and that he thought it better to decide as he did, so that the matter might be settled by a review of his judgment.

November 29, 1884. *Osler*, Q. C., and *M. J. Gorman* moved to set aside the judgment, and enter it for the plaintiff, contending that the plaintiffs, being occupants of lot 29 in the 14th concession of Ferris, crossed by the defendants' railway, the defendants were bound by sec. subsecs. 1, 2, 3, of 46 Vic. ch. 24, to fence where their line crossed this lot; and that, having neglected to do this, as the plaintiff's horses having, in consequence, got on the track and been killed, the defendants were liable, apart altogether from any question of negligence.

H. Cameron, Q. C., and *W. R. White*, contra. Plaintiffs being only trespassers, never having been located or obtained a license of occupation from the Crown, were not the legal occupants, as contemplated by the statute, and cannot compel the company to fence, and hence cannot recover. Before the amendment made by the section referred to, the defendants would not be liable to the plaintiffs: see *Kiln v. Great Western R. W. Co.*, 35 U. C. R. 595; *Wilson v. Northern R. W. Co.*, 28 U. C. R. 276; *Douglas v. Grand Trunk R. W. Co.*, 5 A. R. 585. The Legislature could not have intended to compel the railway to fence against mere trespassers, for this would apply to any person living

any land, whether belonging to the Crown or not. There would be no limit to the liability in such case. An occupant is a person who holds the title, or has the permission of the Crown to occupy it: see *Wharton's Lexicon* as to the meaning of occupancy.

February 9, 1885. WILSON, C. J.—The perusal of the evidence satisfies me that until November, 1883, the plaintiff had no right of occupation of any part of lot No. 29, but of the house which she rented from Mr. Worthington, and that she claimed nothing more at that time than as tenant to Worthington. She may have used part of the small cleared parts about the house and railway ground, but not as of right, and as she said she would have continued to pay rent after November, 1883, till she owned the land, if she had been asked for it; but she was not asked, for it, because the work had gone further east than lot 29, and the men were not boarded upon that lot after that time. They were then boarded on lot 27.

The plaintiff before the horses were killed had been located for lot 26. She continued to live on the east half of 29 till after the horses were killed, that is, till about the last of June, 1884, and then she moved to lot 27, still keeping possession of the east half of 29, by having some of her goods and crops upon that lot.

In May, 1884, she wrote to the Crown Land agent applying for the east half of 29. On the 9th of September, 1884, she made an affidavit, in which Dranley and Halliday joined, that she was head of the family, and had no son, but seven daughters, and that the land she applied to be located for was wholly unoccupied and unimproved.

That affidavit was not correct in several particulars.

1. She was not properly head of the family, for her husband was living.

2. She had a son.

3. The land was not wholly unoccupied, for there were several of the company's men still occupying shanties upon

the lot ; and at that time she had been located for No. 26, and lived upon No. 27.

It appears she never paid taxes upon the east half of 29 until the 27th of September, 1884, according to the receipt, although the receipt was not given till the 6th of October.

Mr. Gorman, the plaintiff's solicitor, wrote to the plaintiff, and Mr. Dranley received it for her about the end of September, in which he stated that neither the plaintiff nor Dranley could recover against the company for their horses which had been killed, unless it could be proved they had some title to the lot ; and the plaintiff said the letter stated by payment of taxes or something of that kind.

Then it appears that Halliday, the collector, claimed from Quirt \$15, being the sum said to be payable for the whole lot No. 29, who refused to pay that sum ; but he paid about two months before the trial, in October, \$11.08, and, as well as I can make out, after the letter came from Mr. Gorman about proving title in Mrs. Conway by the payment of taxes, or something of that kind, Halliday told Quirt to the effect he would let his share of the taxes stand at the \$11.08, and he would get the rest of the \$15 from the plaintiff, and she then paid him \$3.90, making in all \$14.98 for the taxes for 1884.

It is also quite clear that after the receipt of Mr. Gorman's letter, Quirt was sent for on the 6th of October, about nine days before the trial, by the plaintiff, and by those assisting and advising her in this action, to appear before Mr. Shannon, the magistrate ; and Quirt went to the place appointed, the plaintiff's house, and the result of what was then done was that Quirt was induced to give up to the plaintiff all claim to the east half of lot 29, the land in question, and to confine his claim to the west half only of the lot.

The whole country there is unfenced and a common, as the plaintiff said.

Now the question is, was the plaintiff an occupant of the east half of lot 29 at the time her horses were killed on

the 2nd June, 1884? The statute now in force and applicable to this case is the 46 Vic. ch. 24, sec. 9, repealing and amending the 42 Vic. ch. 9, sec. 16, sub-secs. 2 and 3.

It is not necessary to refer to the earlier Act further than to notice that it applied to "the *proprietors* of lands adjoining the railway," whereas the later Act is more largely expressed. It was passed 25th May, 1883, and it is:

Section 16. "Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied.

2. Or, within three months, after such construction hereafter.

3. Or, before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon.

4. [And in the last case after the company has been so required in writing by the occupant thereof],

5. Fences shall be erected and maintained over such section or lot of land on each side of the railway, of the height and strength of an ordinary division fence.

6. With openings, or gates, or bars, or sliding or hurdle gates with proper fastenings therein, at farm crossings of the railway.

7. And also cattle-guards at all highway crossings, suitable and sufficient.

8. To prevent cattle and animals from getting on the railway.

9. But this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

Sub-section 2. "If after the expiry of such delay such fences, &c., are not duly made, and until they are so made, and afterwards, if they are not duly maintained, the company shall be liable for all damages which shall be done on

the railway by their trains or engines to the cattle, horses, or other animals of the occupant of the land in respect of which such fences, &c., have not been made or maintained, as the case may be, in conformity herewith."

In reading these enactments, the parts of section 16 which I have numbered, the parts to be considered in this case are Nos. 1, 5, 6, 7, 8, 9.

The part numbered 1 applies, because the railway was already constructed on this lot at the passing of the Act on the 25th of May, 1883, as the plaintiff said the company commenced running trains past this lot in the fall of 1882, and it is for that reason the parts numbered 2, 3, 4, do not apply.

The effect of the parts so numbered 1, 5, 6, 7, 8, is, that in the case of any railway constructed at the passing of the Act, on any section or lot of land, *any part of which land is occupied*, the company shall within three months after the passing of the Act *fence over such section or lot on each side of the railway, with openings, &c., at farm crossings of the railway, and with cattle guards at all the highway crossings sufficient to prevent animals from getting on the railway.*

Number 9 does not apply here, because no compensation of any kind has been given by the company, and besides it only applies when compensation is given for the dispensation of gates or bars, and has no relation to *fences*.

It is important, however, in this case, because it may enable us to some extent to place a better construction on the word *occupied* in number 1 of section 16, and the term *occupant* in sub-section 2, than if number 9 were not there. Number 9 then provides that the clause relating to gates or bars "shall not be interpreted to the profit of," that is, shall not apply to or be available for, *any proprietor or tenant* of any such section or lot, in case the *proprietor* has accepted compensation for dispensing with gates or bars.

The meaning of the statute is, that no one, not even the proprietor or tenant, can claim to have the railway fenced

off as against him, unless his land is *occupied*, and he or some one for him is the *occupant* of it.

The terms *proprietor* and *tenant* do, *ex vi termini*, mean a person having at least a defined and vested estate. I do not say the estate should be a strictly legal estate, or what before the Judicature Act would have been a trust estate, as valid in effect as a legal estate.

A person claiming the land as his own against the legal owner, by any act of wrong as by a disseisin, dispossession or the like, might, I think, be considered a proprietor under this Act. That term is used plainly in opposition to the term *tenant*. There is no difficulty in determining the meaning of *proprietor*. It is, in my opinion, used to express the full ownership of the land by legal title, or by claim of title. If a person in a contract for sale of land described himself as proprietor, that would be understood to mean that he was the owner of the property: *Rossiter v. Miller*, 5 Ch. D. 648, 3 App. Cas. 1124.

There is more difficulty about the word *tenant*. It means some lesser estate or interest than the actual ownership, and it means something more than mere occupancy.

A mere occupier of land is by express enactment of the Assessment Act, R. S. O. ch. 180, sec. 6, sub-sec. 2, made liable for taxes when the occupation is not exempted by sub-sec. 1. See also sub-sec. 7. But that is because an occupant by wrong derives as much benefit by the property as one by title, and the municipality cannot be required to investigate the title of every one who is in occupation of land, whether it is by right or by wrong, and it is just that the occupant, although without title, should be subject to the burdens of the municipality in like manner as those who hold by title.

So a person who has bought or agreed to buy Crown Lands, or who is located for land as a free grant, is subject to taxation for such land, although no license of occupation, location ticket certificate of sale or receipt for money paid on a sale, has issued; and although no payment has been made on the land; or although part of the purchase

money is overdue and unpaid ; although such person is not in occupation of the land, and although he has not a very secure title, and perhaps no title at all without a license of occupation under the R. S. O. ch. 23, sec. 15 ; and yet the interest of a person having a claim under the Assessment Act, sec. 126, may be sold under the R. S. O. ch. 23, sec. 18, although no license of occupation has been issued.

I am of opinion that if a license of occupation has issued to the locatee or purchaser of Crown land under ch. 23 sec. 15, such person may properly be considered to be a tenant under 46 Vic. ch. 24, sec. 9, if in actual occupation of the land, because such person may maintain action against any wrongdoer as effectually as he could do under a patent from the Crown, and he may assign his interest in the land ; and I am also of opinion that a person who has no license of occupation, &c., but who has a claim and right of occupation of his lot under section 126 above referred to if in occupation of his land, may also be considered to be a tenant of the land under the 46 Vic. ch. 24.

In this case the plaintiff has no license of occupation, or any kind of right or title to the land. She made application for the land, but whether she will be allowed to purchase it or not, if she desire to purchase it, or whether it will or will not be allotted or assigned to her under "The Free Grants and Homesteads Act," R. S. O. ch. 24, if she desire to get it as a free grant, has yet to be determined. It is very probable she may not be located for it, and it is quite certain she ought not to be, for she was before the time her horses were killed, and at the time she made her affidavit to be located for this land, already located for lot No. 26, and her application for this land was in direct violation of section 7 of the Free Grants Act.

I am of opinion, therefore, the plaintiff cannot be considered to be within the terms of the 46 Vic., c. 24, s. 9 under the term *occupant* in that section, and she certainly neither was nor is a proprietor or tenant of the land.

The defendants had the right under the 42 Vic., ch. 9 sec. 7, sub-sec. 3, with the consent of the Governor-in-

Council, "to take and appropriate for the use of their railway and works so much of the wild lands of the Crown lying on the route of the railway as have not been granted or sold, and as may be necessary for such railway." And the R. S. O. ch. 165, sec. 9, sub-sec. 3, is in the like terms, excepting that the consent of the Lieutenant-Governor-in-Council is required. And I think it may be assumed, here that such consent has been given to the company. Now, the defendants did take and appropriate the part of this lot north and south of their railway before the plaintiff was in possession, and they have shanties on it also, and some of their workmen are in possession of them, and that possession had not, at the time when the horses were killed, been in any way abandoned; and the defendants were quite as much in possession of the land, if not more so, than the plaintiff was.

I am of opinion, also, the plaintiff was not in fact an occupant of the land at all at the time when, &c. She had rented the house she occupied from the contractor of the road, and paid him rent for it; and she never by any act further than by writing a letter in May, 1884, to the Crown Lands Agent, applying to be located for the land, had extended her possession or occupation before the time when, &c., beyond the possession which she had during the time of her paying rent for the house she was put in possession of. And her conduct, aided by Dranley, who thought to strengthen his own claim against the company by strengthening her right, under which she claims, by the payment of \$3.90, the balance of taxes claimed from but not paid by Quirt, and the affidavit made by the two before the Crown Lands Agent in September, and the agreement got from Quirt, all just a few days before the trial, shewed a scheme to make out a title to the land to which she had no kind of right.

I cannot say I regret the conclusion I have come to, for although the plaintiff has sustained a serious loss by the destruction of her horses, it was very much her own fault in turning them loose as she did, when the horses would

be almost certain to roam in the small clearing made by the cutting of the railway line, and for the erection of the shanties required for the workmen, and for the defendants' other purposes ; and it would be a great and useless expense, to force the company to fence both sides of the railway along the lots which were occupied, while gaps are left all along the unoccupied lots, through which cattle and horses could always escape on to the line, so long as the occupiers had no side fences to keep their animals from wandering on to the adjacent lots, and getting on to the railway through these gaps.

Upon the whole I am of opinion the motion must be dismissed, with costs.

O'CONNOR, J.—The plaintiffs, as occupants of the east part of lot 29 in the 14th concession of the township of Ferris, in the district of Nipissing, brought this action to recover the value of two horses killed on the railway of the defendants by a locomotive and train of the defendants passing thereon.

The railway at that place was not fenced off from the adjoining lands. The horses were killed on the 2nd of June, 1884. The railway had been constructed across this lot 29 in the early part of 1883.

The only question for decision is, whether the plaintiffs were "occupants," or rather, perhaps, whether the female plaintiff was "occupant" of any part of said lot 29, within the meaning of the 16th section of the Dominion Act 46 Vic. ch. 24.

Section 16, Consolidated Railway Act, 1879, required the railway company within six months after any lands had been taken for the use of any railway, if required by the proprietors of the adjoining lands, to erect fences with gates, &c., at farm crossings of the road, for the use of the proprietors of the land adjoining the railway, &c.

This clause is repealed and amended, and one substituted for it, by the 9th section of the 46 Vic. ch. 24, above mentioned, which enacts :—

Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land any part of which is occupied, or within three months after such construction hereafter * * * fences shall be erected and maintained over such section or lot of land on each side of the railway, of the height and strength * * with openings or gates * * at farm crossings * * sufficient to prevent cattle and animals from getting on the railway * * but this is not to apply to any proprietor or tenant who shall have accepted compensation for dispensing with the erection of such gates or bars.

Thus it is apparent that the case turns altogether on the construction of the amended and substituted section 16 of section 9 of the Amending Railway Act 46 Vic. ch. 24, as applied to the fact of occupancy by the plaintiffs, or either of them. Although the plaintiffs are a husband and wife, living together, yet the wife appears to have been regarded as the business manager, and the owner of the horses, as well as the occupant of the land.

It appears to me that there is no inconsistency between the first part of the amended clause 16 and sub-sec. 2, as, according to the reporter's note, was intimated by the learned Chief Justice.

The first part of the main section creates and enjoins the duty, and is specifically precise and apt in its language, as it ought to be in a case which interferes with the Common Law.

In subsec. 2, the expression: "The occupant of the land in respect of which such fences," &c., "have not been made or maintained," is used only referentially, that is, with reference to the previous specific enactment in the first part of the section, and it must be construed in that way.

It was also urged on the argument that there was an inconsistency between the first paragraph of the main clause, as construed by counsel for plaintiffs, and the last paragraph thereof, wherein the expression "proprietor or ten-

ant" occurs, and the word "occupant" does not occur; and that the expression "proprietor or tenant" controlled the word "occupied" in the first part of the section.

I think the argument is fallacious. The apparent repugnancy is capable of a rational explanation.

The two parts of the clause are consistent with each other. A proprietor or tenant would each have a fixed and certain interest in the land to be affected by the omission to put up gates, &c., and each could release and discharge the railway company from the obligation to erect and maintain for a compensation according to his interest in the land. But the occupant, having no right but that of a mere occupant, or what is commonly called a squatter, could have no fixed or certain interest to be permanently affected by the omission, and his release would be valueless. This construction, I think, strengthens rather than weakens the position of the plaintiffs. The clause as it stood originally in the "Consolidated Railway Act, 1879," applied to proprietors only; but the same word has been construed by the Courts in England, in dealing with the similar Act there, to include tenants also.

What, then, was the object of the amended and substituted clause 16 in the Act of 1883, 46 Vic.? Was it not to give a remedy to persons like the plaintiffs, who were neither proprietors nor tenants? What else could be the object? I am unable to conjecture anything else, or to give any other than an affirmative answer to the former question, or than a negative to the latter.

And this view appears to me to be confirmed by a survey of the situation, and a review of the facts, as regards the Canadian Pacific Railway.

It had been constructed through the settled portion of the country, where the lands were in the hands of proprietors, who were in a position to deal with the company, give the notice required by the Act, if they desired that the company should erect fences, and gates, &c., as provided by the Act, or to release them from the obligation of putting up gates, &c., if they chose to do so.

But the company were then constructing the railway, through forest land of the Crown, where some settlers were going in and occupying lands along or in the neighbourhood of the line or route of the railway.

These settlers had no title except that of mere occupancy, being neither proprietors nor tenants in the legal or ordinary sense of the terms.

At the place in question, and along the route of the railway westward through the Province, or the greater part of it, the lands were not ready or had not been offered for settlement by the Crown Lands Department, and no title but of mere occupancy, coupled with the vague though usually respected right of pre-emption, could be obtained. These settlers required cattle to enable them to get along: the cattle were as liable to be killed by the railway as if their owners were proprietors of the lands, and the killing of them was no less an injury to owners than it would be if they were proprietors of the lands.

On the other hand, it was no more trouble or expense to the company to fence in the one case than in the other; but their doing so as regards occupants under such circumstances would be an encouragement to actual settlement.

Under these circumstances the Amending Act of 1883 was passed, I think, in all probability, for the protection of people situated, in respect to occupancy, as the plaintiffs were.

It is immaterial whether different parts of the lot were occupied by several persons or not.

If a village had been formed at the place in question of such occupants, it could make no difference, except to increase the necessity for fencing, if there was an increase of cattle.

That the plaintiffs entered the house which they occupied as the tenants of and paid rent to Worthington, could make no difference. Whether his tenants or not they were in occupation. However, Worthington, as appears by the evidence, abandoned the house when his contract was completed, and after November, 1883, the plaintiffs

continued in possession independently, cultivated a small portion of the land, used another part for pasture, made an effort to obtain title, as recognized settlers, from the Crown Lands Department, and were awaiting an answer, expected to be favourable to their application, when the horses were killed.

The term "occupied," as used in this clause, must be construed in its ordinary grammatical meaning; in that meaning which naturally and obviously belongs to it, and has been given to it in common language.

It is not a technical term, but one of the common understanding of mankind, and as such in common use: *Wilberforce* on Statute Law, p. 122; *Hardcastle*, pp. 26, 27, 74.

As to what occupancy is. "Occupancy is the thing by which title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else:" *Blackstone* (by Kerr, 4th ed.) vol. ii. p. 74.

"Occupancy is the taking possession of other things, which before belonged to nobody:" 2 *Broom & Hadley's Commentaries*, p. 411.

The plaintiffs' case, in this instance, greatly resembles and is strongly supported by the English case of *Dawson v. The Midland R. W. Co.*, L. R. 8 Ex. p. 8.

If the foregoing is not the correct interpretation of the Amending Act in question, I know not what it means, or that it means, or can mean, anything.

Falling short of that, it means and can mean, as I apprehend, nothing different from, or more than, the Act which it purported to amend. The Amending Act, then, is meaningless and idle. But I am not disposed to take this view of what I conceive to be an important Act of Parliament, having a useful and just object in view, and which is expressed with sufficient clearness and precision by the Act itself. It is unnecessary, therefore, to look for *indicia* outside of the Act, for they can only afford help to give it a forced instead of a natural interpretation.

I think judgment should be entered for the plaintiffs for \$300, and costs.

ARMOUR, J.—The word “owner,” as used in the Consolidated Railway Act of 1879, is therein to be understood to mean any corporation or person who, under the provisions of that Act, would be enabled to sell and convey lands to the company: sec 5, ss. 14; and the word “lands” is to include all real estate, messuages, lands, tenements, and hereditaments of any tenure: sec. 5, subsec. 6. The railway company shall set forth in its book of reference a general designation of the lands intended to be passed over and taken therefor, and the names of the owners and occupiers thereof, so far as they can be ascertained: sec. 8, subsec. 1, a. and b. “Any omission, misstatement, or erroneous designation of such lands, or of the owners or occupiers thereof, * * may * * be corrected:” sec. 8, subsec. 5. “The lands which may be taken without the consent of the proprietor thereof shall not exceed,” &c.: sec. 9.

All corporations and persons whatever, tenants in tail or for life, *greves de substitution*, guardians, curators, executors, administrators, and all other trustees whatsoever not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent, whether infants, issue unborn, lunatics, idiots, *femes covert*, or other persons seised, possessed of, or interested in any lands, may contract, sell and convey unto the company all or any part thereof: sec. 9, sub-sec. 3. “After one month, &c., application may be made to the owners of lands, or to parties empowered to convey lands, or interested in lands, which may suffer damage from the taking of materials, or the exercise of any of the powers granted for the railway, and, thereupon, agreements and contracts may be made with such parties touching the said lands, or the compensation to be paid for the same, or for the damages, or as to the mode in which such compensation shall be ascertained as may seem expedient to both parties, and in case of disagreement,” &c.: sec. 9, sub-sec. 10.

"Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land any part of which is occupied, or within three months after such construction hereafter, or, before such construction, within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon (and in the last case after the company has been so required in writing by the occupant thereof), fences shall be erected and maintained over such section or lot of land on each side of the railway, &c., but this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars": 46 Vic. ch. 24, sec. 9, sub-sec. 16.

"If, after the expiry of such delay, such fences, gates, and cattle guards, are not duly made, and until they are so made, and afterward if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses, or other animals of the occupant of the land in respect of which such fences, gates, or guards have not been made or maintained, as the case may be, in conformity herewith."

These last two clauses were by 46 Vic. ch. 24, sec. 9 substituted for the following clauses in the Consolidated Railway Act of 1879 :

"Within six months after any lands have been taken for the use of the railway the company shall, if thereunto required by the proprietors of the adjoining lands, at their own costs and charges, erect and maintain on each side of the railway fences," &c. : sec. 16, sub-sec. 1.

"Until such fences and cattle guards are duly made the company shall be liable for all damages which may be done by their trains or engines to cattle, horses, or other animals on the railway" : sub-sec. 2.

The term "proprietor," as used in the Act, is included within the term "owner," and the word "owner," as defined in the Act, would seem to include only those corporations and persons mentioned in sec. 9, sub-sec. 3, and would thus include proprietors and tenants; and by the Consolidated Railway Act of 1879, sec. 16, it was only as against such owners of adjoining lands that the railway company were bound to fence.

What difference, then, do the clauses substituted for section 16 in the Consolidated Railway Act by the Act 46 Vic. ch. 24, sec. 9 make in the law as it stood before the passing of the latter Act? Are the railway company bound to fence as against any one but an "owner" as defined by the Act? He is no longer required to be the owner of adjoining lands; it is sufficient if he be the owner of any part of a section or lot upon which the railway has been constructed, or a part of which has been taken possession of by the company for the purpose of constructing a railway thereon; but I think he must be an "owner" within the meaning of the Act, which term, as I have above said, includes proprietors and tenants; and I think the word occupied in the substituted clause means occupied by the owner, that is, the proprietor or tenant thereof; for where there is a tenant both he and his landlord are owners within the meaning of the Act; and I think the term "occupant" in the substituted clause means owner, that is, proprietor or tenant, and I think the use of the terms proprietor and tenant so occupying in the substituted clause, in the connection and manner in which they are used, shews this to be the true construction of the clause.

The clause will then read as follows: "Within three months from the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied by the proprietor or tenant thereof, or within three months after such construction hereafter, or, before such construction, within six months after any part of such section or lot of land has been

taken possession of by the company, for the purpose of constructing a railway thereon, and in the last case after the company has been so required in writing by such proprietor or tenant thereof, fences shall be erected and maintained over such section or lot of land, on each side of the railway, &c.; but this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

"If after the expiry of such delay such fences, gates, and cattle guards are not duly made, and until they are so made, and afterwards if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines, to the cattle, horses or other animals of such proprietor or tenant of the land in respect of which such fences, gates, or guards have not been made or maintained, as the case may be, in conformity herewith."

This construction brings all parts of the clause into harmony, and is, I am satisfied, having regard to the various provisions of the Act which I have above quoted, the true construction to be put upon the clause.

The provisions of the Act respecting line fences, R. S. O. c. 198, entirely support this construction, and the question under discussion has to be considered to some extent with reference to these provisions.

It is not reasonable to suppose that the Legislature intended that the railway company should be bound to fence against any person who should without any title whatever, and as a mere trespasser, occupy any part of a section or lot upon which the railway has been constructed, or a part of which has been taken possession of by the company for the purpose of constructing a railway thereon, and that, too, when such person would not be compellable by, nor could he compel, his adjoining owner to make, keep up and repair a just proportion of the fence which marks the boundary between them.

The plaintiff was a person precisely in this position, and so was Worthington, to whom she at one time paid rent.

I think, therefore, that the company were not bound to fence as against her, and that the order *nisi* must be discharged with costs.

See *Douglas v. London and Northwestern R. W. Co.*, 3 K. & J. 173 ; *Re Evans*, 42 L. J. Chy. 357.

Order nisi discharged, with costs.



[QUEEN'S BENCH DIVISION.]

THE MORGAN ENVELOPE COMPANY V. BOUSTEAD.

Stoppage in transitu—Goods entered and duty paid—Refusal by carriers to deliver.

The plaintiffs, merchants in Boston, sold and consigned goods to J. C. & Son, in Toronto. While the goods were held by the railway company in T. J. C. & Son assigned to the defendant as trustee for the benefit of creditors. The defendant, immediately after the assignment, passed and entered the goods, and paid the duty thereon, and the railway company removed the goods from the Customs warehouse to their freight sheds, where they remained, and delivery was refused to the defendant for nonproduction by him of a bill of lading, and the freight was not paid or tendered. The plaintiff having stopped the goods,

Held, that the *transitus* was not at an end, for that the railway company continued to hold the goods as carriers, and not as agents for the defendant.

The plaintiffs had, before they stopped the goods *in transitu*, proved their claim for the goods on the estate of J. C. & Son.

Held, that this did not deprive them of their rights as lien holders, or affect their right to stop the goods *in transitu*.

INTERPLEADER to try whether certain goods shipped by the plaintiffs to James Campbell & Son were effectually shipped *in transitu* by the plaintiffs, while the same were in the possession of the Grand Trunk Railway Company of Canada, and whether the plaintiffs or the defendant on 10th December, 1884, were entitled as between themselves to the said goods.

The cause was tried at the last Winter Assizes at Toronto, by Galt, J.

The goods in question were carried by the said Railway Company to and arrived at Toronto between the 4th and 15th of October, and were taken by them to their Yonge street shed, which was a sufferance warehouse, and advice notes were sent by them to the consignees.

On the 16th of October the consignees made an assignment to the defendant, and he, on the 17th of October, entered the goods at the customs, and on the 18th of October paid the duties, and the collector thereupon granted his warrant for the unloading of the said goods, and gave the same to the railway company, who thereupon removed the goods to their Simcoe street sheds, whence it was their usual custom to deliver goods to Hendrie & Shedden, who carried them on their waggon to the consignees and received payment of the railway freight and their own charges before delivery. At this time there were also other goods at their Simcoe street sheds for the same consignees. On the 18th or 19th the defendant came to the railway company and asked why they had not sent up the goods, referring to all the goods, and was told that they were consulting their solicitors on the subject, and that in the meantime they required a surrender of the bills of lading, and if their solicitor said anything further was wanted they would require it before giving up the goods. A clerk of the defendant afterwards came to the railway company bringing certain bills of lading, but not of these goods. \$22.50 were due to the railway company for freight of these goods, and no tender of this freight was ever made to the railway company, nor did they ever ask for it. The railway company never consented to hold these goods as the agents of James Campbell & Son, or of the defendant, were never asked to do so, and would not have done so had they been asked. About the 21st of November the railway company had a telegram from the general agent of the Merchants' Despatch Transportation Company to hold these goods, and on the 8th of December the plaintiffs

gave the railway company formal notice of the stoppage of these goods in transitu, and the railway company thereupon applied for and obtained this interpleader. The defendant, on becoming assignee of James Campbell & Son, sent notices to all their creditors to come in and prove their claims, and the plaintiffs forwarded to the defendant their claim for the price of these goods, which claim was sworn on the 2nd, and received by him on the 6th of December.

The learned Judge found a verdict for the plaintiffs.

On February, 10, 1885, *Snelling* moved to set aside the verdict, and enter it for the defendant, on the ground that the verdict was contrary to law and evidence.

Thos. P. Galt shewed cause. The case of *Wiley v. Smith*, 1 A. R. 179, is not applicable, as there the *transitus*, as far as the carrier was concerned, was at an end; and it was held that the Crown, by accepting bonds for the duties, had placed itself in the position of holding for the consignee. In this case the *transitus* of the carrier was not at an end, the goods being in a sufferance warehouse belonging to the carrier, though under the supervision of the government, and the fact that the duties had been paid could not divest the right of the carrier to his lien upon the goods for the freight. Unquestionably a lien existed for the freight, and as no lien can exist without possession it is clear the goods were still in the carrier's custody. The case of *Ascher v. Grand Trunk Railway*, 36 U. C. R. 609, is precisely in point. The case of *McLean v. Breitheop*, in appeal here, but not yet reported, shews that the *transitus* is not at an end until the goods have reached the actual possession of the consignee, or the possession of someone who holds them as agent for him. The right to stop the goods in *transitu* does not affect the contract of sale. So the fact that the vendors proved on an insolvent estate could not affect the question.

Snelling, contra. Prior to the notice of stoppage the transit of the goods in question had been determined, and

their *quasi* delivery complete, because the defendant (trustee for the purchasers) had perfected the entry of the goods in the custom house, and had paid the duties, and thereby the defendant had all the rights of a proprietor, and the goods held by the carriers were held by them as trustees or *quasi* trustees for him. The carriers really held the goods not for the trustee, but for the purchaser. The *transitus*, so far as the carriers were concerned, was at an end, and although the consignee had not the corporal possession of the goods, the entering and passing the goods at the custom house, and the payment of the duties, thereby satisfying all the requirements of the law, were an acceptance of the goods by the consignee and equivalent to taking actual possession of them; and having tendered the freight to the carriers their warehouse became the warehouse of the vendee as between him and their vendors, and consequently the *transitus*, so far as the vendors were concerned was at an end, and their right to stop ceased to exist. He referred to *Wiley v. Smith*, 1 A. R. 179, 2 S. C. 1; *Mottram v. Heyer*, 1 Denio 483, 5 Denio 629, 637; *Benjamin* on Sales, Am. ed. 1079, 1089. The entry of the goods at the custom house and the payment of the duties were in fact acts of possession in favour of the vendee, and should be so considered. The transit is determined when a perfect entry is made, and the goods bonded, and it must be so held if instead of bonding the vendee pays the duty in lieu of giving a bond for payment: *Wiley v. Smith*, 1 A. R. 179. When the vendor has allowed the purchaser to spend money on the goods sold, this is so complete a delivery of possession that it should defeat the vendor's right to stop, and also his lien: *Blackburn* on Sales, 248; *James v. Griffin*, 2 M. & W. 623; *Jackson v. Nichol*, 5 Bing. N. C. 508; *Whitehead v. Anderson*, 9 M. & W. 529.

March 7, 1885. ARMOUR, J.—“The authorities shew that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the pur-

chaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right, the goods must be in the hands of the purchaser, or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary:" per James, L. J., *Ex parte Rosevear China Clay Co., In re Cook*, 11 Chy. D. 560.

In this case the goods never got home to the hands of the defendant, or to the hands of any one who could be treated as his servant or agent, and out of the hands of the Grand Trunk Railway Company, the intermediary, but always remained in the hands and possession of the railway company, subject only to the powers and authorities exercisable in respect thereof by the officers of the customs.

The Yonge street shed, to which the goods were first taken by the railway company, was the railway company's own shed, which had been appointed a sufferance warehouse under the provisions of The Customs Act, 1883, 46 Vic. ch. 12, sec. 32, D., and while the goods were there they still remained in the possession of the railway company, subject only to the said powers and authorities.

The entry of the goods at the custom house, and the payment of the duties thereon by the defendant, had no effect whatever upon the possession of them by the railway company, but only released them from the exercise of the said powers and authorities to which they had before been subject, and enabled the railway company to unload them and to deal with them. See sec. 42 of the Customs Act, 1883.

The railway company accordingly removed the goods to their Simcoe street sheds, where they remained until the right of stoppage was exercised by the plaintiffs, and in my opinion effectually exercised.

The true nature and effect of the stoppage *in transitu* is merely to restore the goods to the possession of the seller, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale; and I think, there-

fore, the plaintiffs were justified in proving their claim for the price of them, and that at all events it did not prejudice their right to stop the goods *in transitu*.

In my opinion the verdict of the learned Judge was right, and the motion should be dismissed, with costs.

WILSON, C. J.—The plaintiffs, who reside in Boston, State of Massachusetts, sold goods to James Campbell & Son, of Toronto. They arrived here by the Grand Trunk, consigned to the purchasers, on the 4th and 15th of October, 1884, and were deposited by the railway company in their sufferance customs' warehouse.

On the 16th of October Campbell & Son assigned to the defendant for the general benefit of their creditors. On the 17th the defendant entered the goods at the custom house. On the 18th he paid the duty on them, and got a permit for the railway company to remove the goods from the customs' warehouse to the general delivery warehouse of the railway, which removal was made.

It was the custom then of the railway company to deliver such goods, without any special order, to the delivery people to load such goods and deliver them to the consignees on payment of freight and of all charges. On the 18th or 19th of October the defendant asked of the railway company why they had not sent the goods up, and was told the railway company were consulting their solicitors. The railway company required the defendant to give up the bill of lading. He did not do so. He did not pay freight. The railway company never assented to hold the goods for him.

On the 18th or 19th the plaintiffs gave notice to the Grand Trunk, in whose warehouse the goods still were, that they claimed the goods. The Grand Trunk refused to give them to the plaintiffs, as they had no consignment note or bill of lading.

The plaintiffs were notified that Campbell & Son had made an assignment, and were asked to send in their claim, and they sent it in, and on the 6th of December they proved their claim under the assignment.

On the 8th of December the plaintiffs stopped the goods as unpaid vendors.

The claim of the defendant to the goods must depend upon :

1. The assignment to him for creditors on the 16th of October.

2. The entry of the goods at the customs house on the 17th.

3. The payment of the duties upon them on the 18th.

4. The permit thereupon granted to the railway company to unload the goods out of the customs' warehouse, and to place them in their own general delivery warehouse, and the fact of such removal being made by the railway company.

5. The demand of them by the defendant from the railway company, who refused to give them up without the production by the defendant of the shipping or consignment note, or bill of lading, which note or bill the defendant had not got, and it is not said that one was ever sent to the consignees.

6. The assent by the plaintiffs to the assignment made by the vendees to the defendant.

I do not think the assignment by the vendees to the defendant in trust for them and their creditors can vest in the defendant the right of a *bond fide* purchaser for value. The defendant is in effect in the like position of the assignee in bankruptcy, and he cannot claim for the other creditors of the bankrupt rights which the vendor could not claim for himself as against the vendee.

What effect had the entry of goods by the defendant, and the payment of duties by him, and the granting of a permit to the carriers to unload the goods, that is, to break bulk, and to remove them from the sufferance warehouse out of the custody of the customs' officer to their delivery warehouse? In *Northey v. Field*, 2 Esp. 613, it is said that until the duties are paid they are *in custodia legis*, and the consignee has no title to the actual possession of them. While they were in that condition the assignee

in bankruptcy of the vendee petitioned to have possession of them, and after that the consignor demanded possession as an unpaid vendor. *Held*, he was entitled to the proceeds of the goods which had been sold by right of his stoppage of them before they were sold.

A delivery order not acted upon does not entitle a person in whose favour it is to get the goods until he pays the duty, although such person is charged with warehouse rent: *Winks v. Hassall*, 9 B. & C. 372. See also *Nix v. Olive*, *Abbott on Shipping*, 12th ed., 424.

In *Orr v. Murdock*, 2 Ir. C. L. R. 9 (1851,) A. sent 10 casks of spirits to E. with a delivery order, directed to the excise officer at Newry, in Ireland, to deliver the goods to B. on his paying duty. B. lodged the delivery order with the excise store-keeper, and removed six of the casks, paying duty thereon. No transfer to B. was made of the spirits on the excise books. B. failed. A. transferred the remaining four casks to C., who paid the duty on them and took them away. *Held*, possession had passed to B. by the delivery, and without any transfer being made to B. in the excise books, and A. had lost the right of stoppage *in transitu*.

The acts done by the defendant shewed the goods had arrived at their destination, but I do not think that shewed they had come to his hands, for they were still in the custody of the Grand Trunk Railway Company's carriers, and their freight remained unpaid upon the goods, for which they were entitled, as carriers, to be paid, and, in my opinion, the goods were, as a consequence, still held by them as carriers, and they had not assented to hold them for the defendant as agents for him.

Now, as to the demand upon the railway company by the defendant for the delivery of the goods to the defendant. The company desired the defendant to shew his authority as consignee, or as representing the consignee to receive the goods. That was not shewn.

The company did not then mention this unpaid freight, nor did the defendant, nor did he tender it, and until the

the defendant had not the right to bring an action for the non-delivery of the goods. Up to that time the Railway Company had done nothing to change the character in which they had originally acquired and retained the goods. They had not become the agents of the defendant to hold the goods for the defendant. They still had the custody of them only in their original right as carriers.

The freight should have been tendered : *Bird v. Brown*, 4 Ex. 786 ; *Ex parte Cooper*, 11 Ch. D. 68.

The defendant, as consignee, could not compel the Railway Company to change their character of carriers, and to become his bailees without their consent : *Whitehead v. Anderson*, 9 M. & W. 518. Nor can the Railway Company without the consent of the vendee change their character of carrier to that of agent for him : *Bolton v. Lancashire, &c., R. W. Co.*, L. R. 1 C. P. 431 ; *Ex parte Barrow*, 6 Ch. D. 783.

As to the plaintiff assenting to come in under the assignment, it does not, I think, affect their other rights, if they have any, as bailees, lien holders, mortgagees, holders as unpaid vendors, or their right as such to exercise the right of stoppage *in transitu*.

If they had assented to the goods in question being considered a part of the debtors' estate, they would of course have no claim against the debtors but that of mere unprotected creditors : *Nichols v Hart*, 5 C. & P. 179.

I do not see in what way the plaintiffs have lost their right of stoppage of the goods as unpaid vendors. They have done nothing more than to invoice the goods to the vendees that we are aware of.

I may refer generally to *Edwards v. Brender*, 2 M. & W. 375 ; *Heineker v. Earle*, 8 E. & B. 410 ; *Merchant Banking Co. of London v. Phœnix Bessemer Steel Co.*, 5 Ch. D. at p. 219 ; *Cooper v. Bill*, 3 H. & C. 722 ; *Valpy v Gibson*, 4 C. B. 837 ; *Ex parte Barrow, In re Worsdell*, 6 Ch. D. 783 ; *Ex parte Rosevear China Clay Co., In re Cooke*, 11 Ch. D. 569 ; *Berndston v. Strong*, 3 Ch. D. 590 ; *James v. Griffin*, 1 M. & W. 20 ; *Kendall v. Marshall*, 11

Q. B. D. p. 364; *Coates v. Railton*, 6 B. & C. p. 425; *Wiley v. Smith*, 2 S. C. 1; *Lewis v. Mason*, 36 U. C. R. 590.

The motion must be dismissed, with costs.

O'CONNOR, J., concurred.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

GEORGE WARIN ET AL. V. THE LONDON AND CANADIAN
LOAN AND AGENCY COMPANY ET AL.

Water lots—Easement—Enjoyment as of right.

A. was lessee for years of the west half, which was practically vacant, of water lot 17, Toronto harbour, B. proprietor of the east half of the same lot, on which, erected more than twenty years before action, were a wharf and storehouse, so near the dividing line of the half lots that vessels could not call at the west side of the wharf, where all the business was done, without passing over the half lot of A. and partially occupying the same while lying at the wharf. B. and his successors had also laid up vessels at their wharf in winter, two or three abreast, occupying part of A.'s half lot nearly every year since the erection of the wharf, and about eighteen years before action built on the wharf an elevator for receiving and shipping grain at the west side of the wharf.

In 1883 A. put up a notice warning persons against trespassing on his half lot, which vessels passing to B.'s lot knocked down. Subsequently, in the same year, A. drove piles into the soil of his own half lot, ostensibly as a foundation for boat houses, and was about to drive others, to the obstruction of the approach to B.'s wharf, when B., to meet this, began moving vessels to and from his wharf, and finally moving them to his wharf and extending into the waters on A.'s lot, thus preventing him from driving more piles. In trespass by the plaintiff, B. claimed, first, an easement by prescription and non-existing grant to the owners of the fee—whose lessee, Taylor, who erected said wharf, was—over A.'s lot to the extent necessary to allow vessels to pass to and from his wharf, and to lie up there; secondly, that the waters covering said water lot were navigable waters, part of Lake Ontario and Toronto harbour, and that the wharf was a construction within the law for the purposes of enabling the harbour to be used, and the safe and useful navigation of said waters, and that the act of A. was a wrongful interference and an obstruction of the use of the said navigable waters, which B. was entitled to abate.

Held, 1. That the waters covering said lot seventeen were part of the navigable waters of Lake Ontario, and the same law was applicable thereto as in the case of tidal waters, in the absence of a valid grant the soil being vested in the Crown and subject to the *jus publicum* of navigation.

2. That the Act 23 Vic. ch. 2, sec. 35, R. S. O. ch. 23, sec. 47, gives to the Crown authority to grant water lots, and the grant of water lot 17 by the description, "land covered with water," was valid under these enactments, and sufficient to pass to the grantee and his representatives, the soil and the *jus publicum* for navigation and the like in the water, which could be built upon, filled up or otherwise dealt with as might be thought proper.
3. That so long as A.'s water was unenclosed or unoccupied any one might pass over or across it without being liable to be treated as a trespasser, and an easement such as that claimed could not therefore be acquired.
4. That the claim to an easement was not founded on an enjoyment *nec clam, nec vi, nec precario*, and was therefore not as of right, and could not be sustained.
5. That the evidence shewed the user of the plaintiff's water lot was not as of right, and the finding of the jury was warranted by the evidence.
6. That neither the erection of the wharf nor its long use, nor the erection of the elevator, shewed such a claim of enjoyment as of right as to satisfy the statute.
7. That in any event the claim was of an easement in gross, and therefore invalid.
8. That the verdict, upon the evidence set out below, should have been against the defendants in any event, because they were not making use of the waters for the purposes of trade and commerce when they anchored the vessels upon the lot.
9. That the patent to the city of Toronto of the water lots, confirmed by the esplanade legislation, gave to the owners of water lots the right to fill in their lots, and turn them into land.

STATEMENT of claim.

The plaintiffs are and at the time of the committing of the trespasses complained of and for long before then were in possession, as lessees of John M. Munro, the owner, of that parcel of land covered with water in the city of Toronto, composed of part of water lot No. 17, in Toronto, according to Young's survey, situate on the south side of the Esplanade, described generally as extending 70 feet from the east side of George street, easterly along the south side of the Esplanade, then southerly parallel to the line of George street produced to the Windmill line; then westerly along the Windmill line 70 feet to the easterly side of George street produced, then northerly along the easterly side of George street produced to the place of beginning.

3. The defendants, S. S. Hamilton and R. B. Hamilton are in occupation of the water lot adjoining to the east

of the plaintiffs' premises, upon which said water lot are built a wharf and elevator and other buildings in connection with the business carried on by the said Hamiltons thereon as wharfingers and warehousemen.

4. The defendants, the said company, are, as the plaintiffs believe, the legal owners of the premises occupied by the Hamiltons, but before the committing of the trespass the company had agreed with the Hamiltons to sell the said premises to them.

5. For some time before the 14th of June, 1883, the defendants had wrongfully claimed and still claim a right of way over the plaintiffs' water lot for ail schooners, tugs, and vessels calling at the said wharf, and also a right of anchorage upon the plaintiffs' water lot for the same, on the alleged ground that they have a prescriptive right to such easements over the said water lot.

6. The plaintiffs have frequently warned the defendants that no such right of way or anchorage existed, and have forbidden the defendants from trespassing on the said property.

7. On the 14th of June, 1883, one Captain Francis Jackman and other servants of the defendants, at the command of the defendants, and with the tug "Frank Jackman" and a certain vessel called the "Pride of the Lakes," forcibly and wrongfully entered upon the plaintiffs' property and broke down the plaintiffs' fences and notices to trespassers, and in spite of the warning of the plaintiffs continued for a long time to use the plaintiffs' water lot.

8. On the 15th of October, 1883, the defendants by themselves and their servants and with vessels trespassed upon the plaintiffs' water lot, and wrongfully and forcibly prevented the plaintiffs and their servants from filling in the same, alleging that a right of way existed upon and over the said water lot for vessels calling thereat, and the plaintiffs had no right to obstruct the same.

9. In addition to the trespasses above set forth, the defendants by themselves and their servants have for some time past used and still continue to use the plaintiffs

water lot for the purposes above mentioned, and to assert their claim to an easement over the same, in consequence of which trespass the plaintiffs have been prevented from using the water lot for the purposes of their business, and have been greatly damnified.

The plaintiffs claim \$1,000 damages.

2. An order restraining the defendants from any repetition of any of the acts complained of, and

3. Such further relief as the nature of the case may require.

The statement of defence of the company was :

1. Admission of the occupation by the Hamiltons of the premises alleged to be in their occupation.

2. That the company were the legal owners of the same, with the right of the Hamiltons to purchase the same.

3. Denial of the trespasses complained of.

4. At the time of the alleged trespasses, and from thence to the commencement of this action, the Hamiltons, as purchasers from the company, were in possession of the said water lot, and subject to such right of purchase the company were, and still are, the owners in fee of the said lot, the occupation of which water lot, for forty years before the suit, they enjoyed as of right without interruption for the more convenient use, occupation, and enjoyment of the said land of the defendants, a way for, in, and with ships, vessels, schooners, tugs, and boats from a public highway on the water of the bay in front of the city at Toronto, over the land now claimed by the plaintiffs to the water lot possessed by the Hamiltons, and from the same over the lands claimed by the plaintiffs to the said public highway at all times of the year, together with the right to anchor at such slips, &c., on the land claimed by the plaintiffs; and also the right to lay up ships, &c., and allow them to remain upon the lands claimed by the plaintiffs during the time navigation was closed in each year; and also at all other times for shelter or repairs, or other cause of detention, as well as for the purpose of loading and unloading at all times of the year.

5. Prescription for twenty years.

6. The plaintiffs, on the occasion of the trespasses alleged, and at other times drove piles in the land claimed by the plaintiffs, and in that way and by other means interfered with and obstructed the defendants in the use and enjoyment of the said way and the said rights, and the plaintiffs threaten, and intend to, and will, unless forthwith restrained from so doing, continue to interfere with and obstruct the defendants in the use and enjoyment of the said way and right.

6a. Amendment. That the lands claimed by the plaintiffs were then, as well as at the time of the alleged trespasses, covered by the waters of Lake Ontario, or of the harbour of the city of Toronto, an inlet of the lake, which was then, and had always theretofore been, and now are public navigable waters flowing and being over and upon the said land, and such waters were not at any time the property of the plaintiffs.

6b. Amendment. The defendants, at the time of the alleged trespasses, and before and since, were entitled equally with the plaintiffs in exercise of the right, as part of the public of Canada, to the full and uninterrupted use and enjoyment of the said public waters flowing and being over and upon the lands claimed by the plaintiffs.

6c. Amendment. The plaintiffs wrongfully, on the occasion of the alleged trespasses, and at other times by the means stated in the 7th and 8th paragraph of the statement of claim, and by driving piles in the lands claimed by the plaintiffs, so that the same stood up through the said public waters, and by other means and devices, interfered with and obstructed the navigation of the said waters and the defendants in their enjoyment of the same, and if the defendants did any of the acts complained of (which they deny), they did so for the purpose of abating a public nuisance existing on the said waters and obstructing the navigation thereof, and which acts of the plaintiffs were also a nuisance and injury to the defendants, and hindered them from the free enjoyment and use of the said public right of navigation.

7. The company have been damnified by the conduct of the plaintiffs.

8. The company counter-claimed as follows:

1. That it might be declared that the owners and occupants of the said water lot were entitled as of right to the way and rights before particularly mentioned in over and upon the lands claimed by the plaintiffs.

2. That the plaintiffs, their servants, workmen, and agents might be particularly restrained from interfering with or disturbing the use and enjoyment of the said way and rights by the defendants.

3. \$1,000 damages for the interference and disturbance by the plaintiffs of the use by the defendants of the said way and rights.

The defendants the Hamiltons pleaded the same defence. Reply.

1. The plaintiffs join issue on the defendants' statement of defence.

2. In reply to the 4th and 5th paragraphs of the company's defence, and the 3rd and 4th paragraphs of the Hamiltons' defence, the plaintiffs say that if upon any occasion previous to the committing of the trespasses alleged the defendants, or any prior occupants of the defendants' premises, used the plaintiffs' water lot for any of the purposes in the statement of defence set forth, such use upon any of such occasions was permitted by the plaintiffs and the prior owners of the plaintiffs' water lot as a matter of grace and favour, upon the request of the defendants and prior owners of the defendants' premises first made in that behalf.

3. The plaintiffs deny the committing of the several acts alleged in the counter-claim of the defendants.

4. The plaintiffs deny that the defendants or certain of them are entitled to the easements or rights claimed by them in their counter-claim, or any of them.

Issue.

The action was tried at the Summer Assizes of 1884, held at Toronto before Galt, J., and a jury.

The questions submitted to the jury were :

1. Did the defendants and those under whom they claim exercise the approach over the plaintiffs' lands under a claim of right? Answer.—No.

2. Did the defendants encroach on the plaintiffs' property when the two vessels were fastened to the defendants' wharf? Answer.—No.

3. Was the proposed erection made by the plaintiffs a reasonable and proper use of their property? Answer.—Yes. Verdict for plaintiffs, and damages \$700.

The following extract of the evidence is that which was chiefly relied upon to prove or disprove an user *as of right*. That there was an actual user of the plaintiffs' waters without interruption until 1878 was not denied by the plaintiffs at the trial.

Archibald Taylor, who went to the east half of this lot, now owned by the defendants, in 1852 or 1853, said: "I built the whole of the wharf, and I left it about four years ago. I built the wharf and used the warehouse about five years after I first went there. I owned vessels doing the general lake business between Chicago and Montreal. They loaded and unloaded at my wharf. When the vessels were loaded they came to the end of the wharf, and when they lightened they worked up the wharf. When light they would go over the other water, which was free the same as the street. After I built the wharf I dredged up as far as where the elevator is now to the jog, so that loaded vessels could come up as shewn on the sketch. When the vessels were light they could go anywhere.

Q. Did you claim you had a right to go over Munro's property? A. No, I have no right to it. No claim.

Q. Did you ever claim any right over Munro's property up to the time that you left? A. No, never. I could not, for I had no right to it.

Q. Then you did not consider that you had any right? A. No, Sir. I had no right. None.

Q. Did Mr. Munro offer any objection to your bringing vessels over? A. No, he never made any objection.

Q. Was there an understanding between Mr. Munro and you on the subject? A. No, except that he never objected.

Q. Was it understood that you did it by favour? A. A loaded vessel could go over it. There was no business done on it, only light vessels could go there.

Q. Would you have thought it neighbourly of Munro if he had refused? A. I did not think that Munro had any

objection. I would not have forced myself upon another person's property.

In cross-examination he was interrogated as to the persons who had been in his employment at the wharf. He mentioned Donald McDonald, who was with him more than twenty years ago; one McKenzie, who was with him more than twenty years ago; and then the witness's son came after McKenzie; and there was one Purdy. These were all the employees he had in his office. He attended himself to the wharf and grain business. He said his son was with him till he (witness) broke up three or four years ago.

Q. You stated Munro had an engagement about making a way between you? A. None except this, that he said so long as I was there that I could use the place.

Q. Was there not a scheme between you that you would each give twenty-two feet to make a way? A. No, there was no arrangement. He could have stopped me at any time. He said that as long as I was there he would not object, and he never did object.

Q. Did you ask him for the permission? A. No, I had my own water, and I could do nothing on his water except to pass and repass with empty vessels.

Q. I had understood there was an agreement as to making a water way? A. No, there was never any agreement between us.

Q. How did Munro come to say this to you? A. When he was building the elevator I found that I was four inches on his ground, and I told him that I would move it before I went further; he said no, since you are so far just let it go up.

Q. Did you not winter vessels there at your wharf? A. Yes, sometimes three or four; they would drop their anchors and moor to my wharf; they would be the width of half over on Munro's lot.

Q. Vessels would anchor on Munro's lot? A. Yes, light vessels.

Q. When your vessel was light you would not hesitate to use Munro's lot? A. No, but we would not use it further.

Q. You did not hesitate to use it? A. No, and any vessel would come there whether they were mine or not.

Q. Did you charge anything for vessels wintering? A. No.

He said when the dredging was done at his lot a width of twenty-two feet was dredged to the west of his wharf; he wanted more dredged in that direction, but Mr. Tully would not let him dredge any part of Munro's lot.

Q. You laid vessels up and anchored on Munro's lot without permission? A. Yes.

Q. Did he know you laid up vessels there? A. Yes, and he never found any fault.

Q. Would it not have been very inconvenient if Munro had fenced his lot in? A. Yes, I had not width enough, and if he had fenced his lot in I could not have loaded big vessels there, or laid them up as I did, but he never found fault with me.

Q. Did the possibility of his building or fencing occur to you when you built your wharf? A. No, I never gave it a thought.

Q. If you had known that Munro had a right to fence in his lot or to fill it up would you have built as you did? A. No.

Q. You never asked Munro permission to use his lot with vessels or to lay them up? A. No, if he had wanted to build I could not prevent him. If I had thought he would have built I would have made my wharf forty feet in place of fifty feet.

Q. The only point as to which you had any conversation with Munro was as to the four inches which the elevator ran over on him? A. Yes, that was all, and he said as it was so little to let it stand.

Q. Was the dredging of twenty years ago confined to your own lot? A. Yes.

Q. Has Munro's lot ever been dredged? A. No. The width of the "J. G. Worts" is 26 feet. She would not get to my wharf without encroaching on Munro's water.

Q. Then back of twenty years ago you went over Munro's lot at the top of the vessel and he never interfered? A. Yes, I did so, and he never interfered.

Q. Then when vessels were partly unloaded they came up and over Munro's lot in that way? A. Yes.

Q. Then when the company got the property, did you consider they would have the right to do the same? A. No, they had no right. I was to use it as long as I was there.

Q. Then the company would have the same right as you, would they not? A. No, I was there for a number of years, and paid taxes for years.

Q. Then you do not consider the company had any right?
A. No, I do not think any one had any right excepting Munro.

Q. Did you think that you had any right to assign to the company? A. No; it was never spoken of.

Q. You considered that you had a right to go over Munro's water as you were doing? A. If a man wanted to keep possession of his property he could fence it or build on it; but as long as it is open any one can use it. If the owner wished to say that we could not use it, he would have a right to say so.

Q. If you had the right for twenty years, the law would give it to you? A. It might on land, but not in water.

Q. Then you don't know the law gives one the right to water, after twenty years, the same as land? A. No; if one uses a man's water for fifty years it will not give him a right any more than one year would. I never knew the law of the land extended over water.

In re-examination he said: "I had Munro's consent so long as I was there myself. It was a privilege he never objected to. He could have done what he liked with his own property. I had no writings for it."

Re-cross-examination.—When you say you had Mr. Munro's consent, do you mean any thing more than that he did not object? A. All I mean is that he never objected.

Kivas Tully said he was acting for the Harbour Commissioners in 1865, and he did dredging on the plaintiffs' lot. He was dredging then on Captain Taylor's lot, and Captain Taylor wanted him to dredge on to the Munro lot, saying he had permission to do so; that of course must have been the permission of Mr. Munro, the owner.

Frank Jackman, a witness for defendant, said he had several conversations with the late George Munro, and he said he intended some day to run his wharf out and leave about the same width of water that Captain Taylor had, so that he would have two sides to his dock. That was in 1864. He wanted the witness to lease the lot. The witness said he had no call for it. Munro said, "Well I will have to do it some future day myself."

Q. Do what at some future day? A. Build a wharf.

Q. You had other conversations with him you say? A. No. I had no other conversations with him about that.

Q. Did you have any conversation at any time with Mr. Taylor about the matter? A. Yes.

Sydney Hamilton, one of the defendants, said on cross-examination: "It is customary in Toronto harbour to go wherever we can go and want to go with a vessel. We can go wherever we can get a vessel to float, if there is a dock there to go to."

Capt. *Lundy*, for the defence, said: The storehouse on the defendants' wharf was built with the doors to the west—there are none to the east—and for the use of the wharf on the west side.

In cross-examination he said: Q. "It is the custom to go where you please on the water as long as there are no obstructions?" A. I always understood water privileges had no right to be stopped.

Q. As long as the water was open you went where you pleased? A. Yes. I considered I had a right to go anywhere I could float.

Reply.

Thomas Chapman said he rented the wharf from Capt. Taylor from 1873 to 1878, and left it in 1878. It was vacant after that for three or four years.

Q. Did you ever claim any right over any other water? A. No, we just used the water on that side.

Q. Did you claim any right? A. We just used the water on that side.

George Munro, a son of the original owner, said he heard the conversation Capt. Taylor spoke of having between himself and the father of witness about threatened encroachment of the elevator on the west lot.

Cross-examined.—Throughout those years the vessels passed over your father's lot on to Captain Taylor's lot? A. Certainly.

Q. Uninterruptedly? A. Certainly.

At the Michaelmas Sittings, 27th November last, *Arnoldi* obtained an order *nisi* for the defendants, calling upon the plaintiffs to shew cause why the verdict and judgment in this cause should not be set aside, and a new trial be granted, on the following grounds:

1. The verdict was against law and evidence and the weight of evidence, because on the whole case the verdict should have been for the defendants.

2. The learned Judge improperly rejected material evidence tendered by the defendants in their behalf in the

course of the trial, as appeared by the shorthand notes of the trial, and among other evidence so improperly rejected was the evidence as to the mode in which the harbour of Toronto and the waters of the harbour were used and enjoyed, being evidence of statements made by Archibald Taylor, deceased, at various times, at variance with statements made by him in his depositions *de bene esse*, and other evidence.

3. That the waters upon the lands claimed by the plaintiffs were navigable waters of Lake Ontario, or of the harbour of Toronto, an inlet thereof, in which the plaintiffs had no property, and the act of the defendants, of which the plaintiffs complained, was only the abating and preventing of a nuisance in navigable waters, which they were entitled to abate, because the obstructions placed and intended to be placed by the plaintiffs interfered with the use of the said navigable waters for the purpose of trade and commerce.

4. The learned Judge erred in not withdrawing the case from the jury, the questions involved being purely questions of law, or undisputed facts.

5. The damages assessed by the jury were excessive.

6. And on the ground of misdirection and non-direction in this, that the jury should have been told that even if the grant of the water lot under which the plaintiffs claimed title were by virtue of the statute referred to in the charge (*sic*), that statute referred to regulations and limitations, and the plaintiffs did not shew or prove the erections they proposed to put up were authorized by any regulations or limitations which were reasonable; and the learned Judge should have told the jury that the grant of a water lot was at common law and by statute subject to the right of navigation over the same, and that the driving of piles by the plaintiffs was a direct interference with the rights of navigation, and was so intended by the plaintiffs, and would have the effect of closing the channel to and along the defendants' wharf; and the learned Judge should have told the jury that the act of

the defendants in keeping the channel open was a reasonable act, and that they were not responsible if their sole object was for the purpose of keeping the said channel open: that the learned Judge should not have told the jury that the plaintiffs' right to recover was clear, and that he should have told them that it would be a question for them to decide whether the defendants' wharf was a reasonable occupation of their water lot for purposes of trade and commerce; and the learned Judge should have put the question to the jury whether the erections of the plaintiffs were for the purpose of trade and commerce, or merely for the purpose of having a house for pleasure boats; and that the learned Judge should not have told the jury that a person had a right to use property such as that in question just as he pleased; and the jury should not have been told that the defendants were guilty of an illegal act in encroaching on the land by the vessels "Annie Craig," and "Lillian," when they were moored together; and the learned Judge erred in ruling and telling the jury that upon the evidence of Archibald Taylor taken *de bene esse*, there was not evidence of a user of the water and lot in question by Taylor, and by those claiming under him, including the defendants, under a claim of right.

7. That the plaintiffs had no right to drive the piles or build the erections contemplated by them upon the water lot in question.

There was also notice of motion given.

Arnoldi and *Howland* supported the order *nisi* and notice of motion. The plaintiffs and defendants claim title to the east and west halves of water lot No. 17, in front of the city, according to Young's survey, the plaintiffs claiming the west half of the water lot to the Windmill line, and the defendants claiming the east of the lot also to the Windmill line. Captain Taylor was the lessee of the east half, and for some years before 1863 he had a wharf and store-house upon it, carrying on the business of a warehouseman and wharfinger. About 1864 he extended

his wharf further into the bay, and put up a very large, expensive storehouse, having the frontage of it to the west.

Mr. Munro, the owner of the west half of the lot, did not build, nor has any one claiming under him built upon the most southerly part of the west half of the water lot, and the occupiers of the east half of it on which the wharf and storehouses were built, have used the right to pass over the unoccupied part of the west half lot, still covered with the waters of the bay, in going to the wharf and storehouse on the west half, and there loading and unloading and departing from the same, and that has been for more than twenty years without interruption of any kind by owners of the west half of the lot, who had knowledge all the time, not only of the construction of the wharf and storehouses on the east half, but of the storehouse being intended to be used by vessels lying upon the west side of that east half lot, and in doing so that they would necessarily pass over the waters of the west half, and occupy while so lying at the wharf part of the waters of the west half.

The defendants claim an easement over these waters of the west half at the least; but they also claim the absolute and legal right to pass over such waters and to anchor there until at least the owners of the west half (if they have not lost their right, which the defendants claim by easement) put up a proper wharf upon their lot.

And the defendants say that the piles which the plaintiffs drove into the soil in the waters on the west half lot, not far from the west side of the east half lot, were not driven and put there for the purpose of trade and commerce, but for keeping pleasure boats in boat-houses proposed to be erected on these piles, as the plaintiffs' say, but as the defendants say for the mere purpose of preventing the defendants from using the waters of the west half as fully as they had heretofore used such waters, and that they the defendants were justified in removing the piles so driven there to the defendants' injury.

The following authorities were cited: *Lancaster v. Eve*,

5 C. B. N. S. 717; *Metropolitan Board of Works v. Flight*, L. R. 9 Q. B. 58; *Griffith v. Brown*, 5 A. R. 303; *Gale* on Easements, 5th ed., 5, 23, 28; *Coulson & Forbes* on Waters, 88, 421, 434, 488, 58, 76, 78; *Attorney-Generat v. Parmeter*, 10 P. 378, 412; *Hood v. Harbour Commissioners of Toronto*, 34 U. C. R. 87, in Appeal 37 U. C. R. 72; *Free Fishers of Whitstable v. Foreman*, L. R. 3 C. P. 578; *Mayor of Exeter v. Warren*, 5 Q. B. 773; *Gunn v. The Free Fishers of Whitstable*, 11 H. L. 192; *Wood v. Esson*, 9 S. C. 239; *Rose v. Groves*, 5 M. & G. 613; *Chairman, &c., of Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Wharton's Law Lexicon* "Wharf"; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Williams v. Wilcox*, 8 A. & E. 314; *Dime v. Petley*, 15 Q. B. 276; *Young v. Wilson*, 21 Gr. 144, 611; *Hendry v. English*, 18 Gr. 119; *Jones* on Prescription, 252, 183; *Roscoe's N. P.*, 15th ed., 38 to 40; 12 Vic. ch. 81; 16 Vic. ch. 219; 23 Vic. ch. 2, sec. 35; 10 & 11 Vic. ch. 5, preamble; R. S. O. ch. 23, sec. 47, ch. 108, secs. 34, 35, 38, &c.

T.P. Galt, contra. There is no ground for presuming a grant; nor can an easement be established if the persons setting up such claim, or those from whom they have title, have exercised the privilege by the leave and licence of the owner of the property in or over which the right is claimed. And the evidence of Taylor, who occupied for a great many years the east half lot, and who built his wharf and storehouse, was that he never claimed any right against the owner of the west half lot. He referred to *Addison* on Torts, 4th ed., 114; *Angell* on Water Courses, 7th ed., secs. 216, 392, pp. 374, 379; *Bright v. Walker*, 1 C. M. & R. 219, 4 Tyr. 502; *Hood v. Harbour Commissioners*, 34 U. C. R. 87, in appeal 37 U. C. R. 72; 15 & 16 Vic. ch. 219; 20 Vic. ch. 80, sec. 4; 23 Vic., ch. 2, sec. 35; *Wood* on Nuisances, sec. 835; *Ross v. Corporation of Village of Portsmouth*, 17 C. P. 195.

Arnoldi, in reply. There has been an uninterrupted enjoyment by the defendants and by those for whom they claim for more than thirty years, and for more than twenty

years after very expensive works done upon the east half lot. *Lyon v. Fishmongers Co.*, L. R. 1 App. Cas. 662, 671.

February 9th, 1885. WILSON, C. J.—The paper title was not in dispute at the trial. It was not contended the plaintiffs were not the lessees of Mr. Munro of the water lot they claim, nor that he is the person entitled to the fee by conveyance from the city of Toronto, nor that the city were the patentees of the lot; nor was the title of the water lot of the defendants questioned. The controversy was, just as the pleadings shewed, whether the defendants had acquired an easement over the plaintiffs' water lot by reason of their long user of the water on the west side of the plaintiffs' lot, and so were entitled to remove the piles which the plaintiffs had driven into the soil of their water lot over which the defendants claimed the easement, interfering with that easement, or whether the defendants were entitled to use the waters of the plaintiffs' lot to the extent to which they had theretofore used them for vessels coming to and leaving their wharf and storehouse, and for vessels lying and anchoring there in the usual course of trade and commerce, and so had the right to remove the piles which the plaintiffs had driven into the soil of their water lot on which to build houses for pleasure boats, and which piles interfered with the use of the plaintiffs' lot by the defendants, which they claimed; or whether the waters of the plaintiffs' lot were public navigable waters which the defendants were entitled to use as a public right, and so the driving of the piles in the soil of the plaintiffs' lot was a public nuisance, and the defendants had the right to abate the same.

The title to the water lot so far is in question, but not, as has been stated, the mere fact of the plaintiffs' paper title to the same.

The facts are not denied, but the inference from or the law upon these facts is the subject submitted for our consideration.

The claim which is set up by the defendants is not properly an easement, but a claim in gross of what is equivalent to a right of way over the plaintiffs' waters, and there cannot be such a right: *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687; *The Grand Hotel Co. v. Cross*, 44 U. C. R. 153. As the arguments were upon a different view of the case, I shall consider it further upon that ground.

The Crown, in my opinion, is the owner of the soil in these large lakes just as much so as it is in the soil of the sea, and in the rivers where there is the ebb and flow of the tide, and also of the soil in the bays of the lakes as part of the same, at any rate of such of them as are navigable.

That is the opinion held in the United States: *Gould on Waters*, secs. 82 to 85, 203, referring to many cases in support of it.

In *Coulson and Forbes's Law of Waters*, the law in the United States seems mentioned with approval.

In *Briston v. Cormican*, L. R. 3 App. Cas. 641, it was decided the Crown had no right to the soil or fisheries of a large non-tidal lake. The lake was "from fourteen to sixteen miles long, and from six to eight miles broad."

The Lord Chancellor, at p. 653, said: "But although it is so large I am not aware of any rule which would *prima facie* connect the soil or fishing with the Crown, or disconnect them from the private ownership either of riparian proprietors or other persons." Lord Blackburn, at p. 666, said: "It is clearly and uniformly laid down in our books that where the soil is covered with water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to shew that the Crown is of common right entitled to land covered with water, where the water is not running water forming a river but still water forming a lake. * *

I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so

small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad filum aquæ*, should apply to a lake, is a different question. It does not seem very convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough many miles in length tacked on to his frontage. * * It is, however, necessary to decide whether the Crown has of common right a *primâ facie* title to the soil of a lake. I think it has not. I know of no authority for saying it has, and I see no reason why it should have it."

Lough Neagh, calling it fifteen miles by seven miles, will contain 105 square miles. Lake Ontario, the smallest of our great lakes being about 190 miles by (which I state as an approximate) 40 miles, will make 7,600 square miles, or more than seventy times the size of Lough Neagh, which I think must make a difference in the law applicable to such enormous surfaces of water.

Then take Lake Superior, which is about five times as large as Lake Ontario. Is the law applicable to it to be governed by the law applicable to Lough Neagh?

It is clear the proprietors of land on the shores of these lakes do not own the soil *ad filum aquæ*, and I adopt, without hesitation, the law laid down by the American cases referred to in *Gould on Waters*, before mentioned; and I agree that what might be an obstruction in the *alveus* of the "narrow Kilmarnock water" would not be an obstruction in "the river Amazon, which is many miles wide": per Lord Blackburn, in *Orr Ewing v. Colquhoun*, L. R. 2 App. Cas. at p. 861.

It is not contended that the Crown, although owner of the soil in these lakes and bays, parts of the lakes, would have the right to grant the right to build upon the soil, and in and over the navigable waters in the harbour and bays, to the prejudice of any proprietor of land fronting on such waters, or to the prejudice of the public rights to navigate over all such waters.

I merely say that by the common law in such lakes as these are here the Crown has, in my opinion, the proprietary right to the soil of the lakes.

The Crown in this country has long exercised the right of granting water lots. But that right being doubted, the 23 Vic. ch. 2, sec. 35, enacted that "whereas doubts have been entertained as to the power vested in the Crown to dispose of and grant water lots in the harbours, rivers, and other navigable waters in Upper Canada, and it is desirable to set at rest any questions which might arise in reference thereto, it is declared and enacted that it has been heretofore and that it shall be hereafter lawful for the Governor-in-Council to authorize sales or appropriations of such water lots under such conditions as it has been, or it may be deemed requisite to impose." See also R. S. O. ch. 23, sec. 47, which has the additional words, "but not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river, or other navigable water." These words were added, I should think, "*ex abundanti*" for the grant must have been subordinate to the public rights; that is, that the navigation should not be interfered with, although it might be restricted or limited, but not so as to impair the usefulness of the public rights of navigation and the like. The erection of a wharf, for instance, may to some extent limit the navigation, but it does not do so necessarily to any appreciable extent; that is, it does not interfere with it, and it may be an erection beneficial to the public, and not a nuisance to be complained of or abated: *The Queen v. Betts*, 16 Q. B. 1022; *Attorney-General v. Terry*, L. R. 9 Ch. 423; and nuisance or no nuisance is a question of fact and not of law: *Rex v. Russell*, 6 B. & C. 566; *Regina v. Betts*, 16 Q. B. 1022.

It cannot therefore be disputed that the Crown had and has the right to grant water lots; that is, as I understand it, the soil which the crown holds as its own special property: *Hales's De jure Maris*; *Parmeter v. Attorney-General*, 10 Pr., at p. 431; and the crown right of the *jus publicum* for navigation and the like; that is, the Crown

can transfer the whole of its rights, private and public to a grantee, subject, as the statute says, that the grantee shall not interfere with the use of the harbour as a harbour, or with the navigable rights of the public.

The public right of navigation on a river may be extinguished by Act of Parliament: *The King v. Montague*, 4 B. & C. 598.

The Crown by patent of the 21st February, 1840, granted certain water lots and strips of land to the city in trust to lease those which had been so granted, and within three years after using or leasing the same the city or the lessees should make the Esplanade, and in trust when the other lessees or grantees of the water lots let or granted before the patent to the city should make the Esplanade across their land, the city should convey to them the continuation of these lots to the windmill line, and also the piece of land from the north of their lots to the foot of the bank.

The city was afterwards empowered to construct the Esplanade by the 16 Vic. ch. 209.

By the Act 20 Vic. ch. 80, further legislation was passed respecting the Esplanade.

Under the authority of the patent and statutes the city on the 8th September, 1863, granted the land covered with water to George Munro, from the windmill line up to the southerly part of his then water lot, the west half of number 17; and on the 1st of November, 1882, John Munro, deriving title from George Munro, demised the same to the plaintiffs.

The plaintiffs have therefore during their term all the rights of the Crown on and to the land covered with water and to the waters thereon, and under the patent of the city, and the statutes referred to, the lessees and owners of these water lots would not have exceeded their rights if they had filled up their lots to the windmill line, or put wharves upon them as the defendants or those from whom they claim have done, nearly up to that limit. The grant was made of these lots to the windmill line because it must have been assumed that the encroachment on the bay

to that limit would not interfere with the harbour as a harbour or with the right of navigation. In *Gould on Waters*, sec. 138, it is said: "It is competent for the State Legislature to establish wharf or harbour lines, and to empower commissioners to license wharves and piers extending to such line;" and also that "the mere establishment of a harbour line is not an abandonment of the title of the State to the tide waters within the line."

It is also said that the statutes of some of the States authorize the filling out to the harbour line; but that does not divest the title of the State to the space within the line until it has been actually occupied or filled; and that such a right may authorize not only the right to build wharves, but to pass the title to the land or soil below; and reference is made to many cases, in the notes to that section, in support of the different propositions.

The defendants had the right, I think, to use the open water at the south of the plaintiffs' water lot in going to or from their wharf or storehouse, because it is still open water, and a license at least may be implied from the owner of the water lot, while it is in that state, for all persons to use it, just as they are entitled to use the outer waters of the harbour.

It is said a title by prescription may arise against the Crown as to the soil: *Gould on Waters*, sec. 37; and that is, I presume, because the soil is considered the private property of the owner; but I should think, considering the peculiar nature of the property, it would require the very strongest proof to establish it.

It is difficult to understand how a prescriptive right, such as the defendants claim here, can be acquired, for it is a claim adversely to the true owner; that is, it is a claim by one who had no right, but was doing a wrongful act against the owner, until, by length of time, that wrongful continuance operated against the owner's rights.

Now, in the case of open water, which the owner has the right to fill up, build over, or enclose, it is said the public have the right to use that open water until it is built

over, filled up, or enclosed. If so, the exercise of *that right* is not a wrongful act; it is one which the owner cannot forbid, and, besides, it is a right which all the public have and an easement cannot be created in favour of the public it is a right which accrues to individuals and in respect of property.

If the defendants have a right it seems to me it is not properly by an *easement* acquired, but a claim in equity such as a person may have against the rightful owner, when that owner A. has seen the adjoining proprietor, B. put up expensive works upon his own land upon the faith or expectation, or implied engagement that A. would give to B. such rights over A.'s land without which B.'s expenditure would be perfectly useless.

But assuming that the defendants can set up a claim of easement against the plaintiffs, it can be only during the plaintiffs' term. Passing over that, however, what is their claim? It is this. They own the east half of water lot No. 17, seventy-two feet. Upon that lot Captain Taylor, the lessee of the lot, and whose title the defendants have, as well as the title of the reversioner in fee, built a wharf about the year 1852, about fifty-four feet wide, and extending southerly to within about fifty feet of the windmill line, so that the only spare water they have upon their lot to the east of their wharf is a strip about nine feet four inches wide at the south-east corner of their wharf narrowing towards the land at the north to almost nothing, so that they have no room left for vessels approaching the east side of their wharf of any size, unless by encroaching on the owner to the east of them. And on the west side of their wharf they have left at the south-west corner a space of only nine feet three inches to their westerly limit, varying in width to about sixteen feet in a line with the north limit of the storehouse, and a little more than that somewhat further north, and that is not wide enough to allow vessels such as frequent that wharf from approaching it unless by encroaching upon the plaintiffs' lot. And it appears the width of the defendants' lot of 72 feet is not

sufficient to let vessels, such as usually frequent the defendants' wharf, from lying there, unless by encroaching upon the adjoining proprietors' lots either to the east or to the west of the defendants' own lot.

So having turned their own lot to its full advantage they claim now they cannot get the benefit of it unless they are allowed to use part of the plaintiffs' lot, and that claim the plaintiffs resist.

What evidence is there to support this claim of the defendants *as of right*?

Whatever evidence there is, is to be found in the evidence, which I have read over carefully, of Archibald Taylor and Thomas Chapman chiefly, the two lessees of the defendants' lot, and of the actual user by some of the other witnesses.

The wharf of defendants was extended to its present limits in 1858, and the storehouse at the south end of it was then built. The elevator was built in 1864. The spouts and doors of it are on the west side. The dredging there was done in 1865 for Captain Taylor. This action was commenced on the 27th of November, 1883.

The plaintiffs put down stakes on their lot in 1882, and put notices upon them forbidding persons from coming on the waters of their lot. A vessel coming in to the elevator broke the stakes down, and the Hamiltons were spoken to of it, and they said they had their instructions from the company to knock down any obstructions put there. Spiles were after that, some time before June, 1883, driven into the plaintiffs' soil, which prevented vessels going to the elevator, and in that month they were broken down by the direction of the defendants, and the plaintiffs were prevented from continuing their spiling.

In considering whether the defendants and those from whom they claim title have in fact used the waters of the plaintiffs' lot for twenty years in order to take vessels of all kinds to the elevator, it appears from these dates the defendants had not the use of the waters of the plaintiffs' lot for twenty years to the elevator.

The dredging to it was done in 1865, to enable lone vessels to go to it, and the action was begun before the twenty years were complete.

There has been a longer use of the plaintiffs' waters to the storehouse at the south end of the defendants' wharf, and also of the west side of the defendants' wharf, where the waters of the bay still flow without obstruction to vessels. That period may be reckoned from 1858, at which time the defendants' wharf was extended, and the storehouse at the south of it was built.

The question then is, have the defendants acquired the uses as of right of these waters by or through the claim of those from whom they have their title?

What is the meaning as of *right*?

In *Campbell v. Wilson*, 3 East 294, the jury were told that unless they could refer the enjoyment of a way for over twenty years 'to leave, or favour, or otherwise than as under a claim or assertion of right, it would repel the presumption of a grant; and in that case, or if they thought it had not been enjoyed adversely for twenty years, they must find for the plaintiff; and the Court sustained the finding.

In *Bright v. Walker*, 4 Tyr., at p. 509, a verbal license for the user defeats the claim as of right. See, also, *Monmouthshire Canal Co. v. Harford*, 5 Tyr., at p. 85.

Tickle v. Brown, 4 A. & E. 369, shows the words as of *right* mean, per Lord Denman, C. J., at p. 382, "an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user."

Beasley v. Clarke. 2 Bing N. C. 705, shews the plaintiff against whom user as of right is pleaded may show in answer "the user was by stealth, or without the knowledge of the owner, or that it was merely a precarious enjoyment by leave or license."

The user or enjoyment must be of an easement *as such*. *Only v. Gardner*, 4 M. & W. 496, 501. In *Eaton v. The Swansea Waterworks Co.*, 17 Q. B. 267, Erle, J., said: "There has been much difficulty as to their construction," ("as of right.") "But it seems clear that if the enjoyment is clandestine, contentious, or by sufferance, it is not of right. Enjoyment as of right must mean *nec clam, nec vi, nec precario*." Mere enjoyment is not enough to give a title by prescription, it must be an enjoyment by a person claiming *as of right*: *Gavel v. Martyn*, 19 C. B. N. S. 732-747; In *Mason v. Shrewsbury and Hereford R.W.Co.*, L. R. 6 Q. B. 578. Blackburn, J., said at p. 584: "I think *Wood v. Waud*, 3 Ex. 748, is in effect a decision that an active enjoyment in fact for more than the statutable period, is not an enjoyment as of right, if during this period it is known that it is only permitted so long as some particular purpose was served. It is in exact conformity with the civil law, the enjoyment must be '*nec clam, nec vi, nec precario*.' In *Wood v. Waud* the nature of the sough shewed that though the water in fact had flowed for sixty years, yet from the beginning it was only intended to flow so long as the coal owners did not think fit otherwise to drain their mines, and so was precarious."

The evidence of Captain Taylor, from whom the defendants claim their right, shews that he never claimed a right in any form at any time. He did not use the waters of the plaintiffs' land as against the owner Mr. Munro, nor as of right, but by sufferance merely. The evidence of Mr. Tully, a witness for the defendants, is, that in 1865 Taylor claimed the right to have dredging done on Mr. Munro's ground expressly by Mr. Munro's *permission*.

It is not the mere enjoyment for a particular period which gives the claim, it is the enjoyment *as of right*, and the nature of the enjoyment is therefore enquirable into. If a son were allowed to pass over his father's land for twenty years, could it be said that the mere fact of user for that time had conferred a title as of right. In this case there was sufferance at the most against the owner of

the plaintiffs' lot. But I am of opinion there was scarcely so much as sufferance, for these waters were by the lot not being filled or built upon by a wharf or other structure still open and common as part of the harbour, and there was nothing to prevent any one, the owner of the adjoining wharf or others, from using them while they were open and navigable.

To exclude the owner from the full benefit of property of that peculiar kind would require the very clearest evidence against him; as that he encouraged the building of the defendants' wharf, and storehouse, and elevator, in the manner and places where they are built, knowing they could not be properly or profitably used without the user of his waters or the like. There is nothing of that kind here, for Captain Taylor said he put up these structures of his own motion. He had no communication with Mr. Munro about this, and he said he never gave it a thought about his access to those buildings being stopped by Mr. Munro at any future time, and he never doubted Mr. Munro's claim to use his lot as he liked, and at any time that he pleased.

The nature of the use of such waters as these is well stated in *The Attorney-General v. Chambers*, 4 DeG. & J. 55, and in 5 Jur. N.S. 745-747. The Lord Chancellor, upon a claim being made by a party who had turned out his cattle upon a marsh which crossed the invisible line of boundary which separated the marsh from the sea shore, and the cattle being allowed thus to stray on to the sea shore without interruption, said: "But the effect of acts of ownership must depend partly upon the acts themselves and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed lands to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusions, and if it could it would not be worth the trouble of preventing it, that mere user is not sufficient to establish a right, but it must be founded upon

some proof of acquiescence and knowledge by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition."

The finding of the jury for the plaintiffs on the question of claim was quite right. Their finding that the plaintiffs driving the piles on their own soil, although it interfered with the defendants' user of the plaintiffs' waters, was also quite right; but it was also, as we think, an unnecessary finding.

The verdict should strictly have been against the defendants in any event, according to the evidence, because they were making claim to the waters of the plaintiffs for the purpose of trade and commerce; but it was not for the purpose of trade and commerce that the defendants anchored the vessels "Annie Craig" and "Lillian" in the plaintiffs' water.

The general question of right was no doubt the principal question; but it was a little strange for the defendants to declaim against the plaintiffs for using their own waters, not for the purposes of trade and commerce, in driving the piles for the support of the boat house they proposed to build upon them, while the defendants were blockading the plaintiffs in their own waters.

The verdict should be against the defendants upon all the issues, and against them upon their counter claim as well. It is a claim of a very unreasonable kind which is made by the defendants. It is that they are entitled to use all their own waters and erections as they please, and that they are at liberty to use all the plaintiffs' land and waters too, without interference or question by the plaintiffs because they find it convenient for the purposes of their wharf, elevator, and warehouse, although they thereby render the plaintiffs' property practically useless to them, or greatly reduce it in value, and that the plaintiffs must suffer that loss for the aggrandizement of the defendants who never paid a farthing for the benefits and advantages which they claim.

I shall now take the heads of the defendants' order *nisi*, and dispose of them separately.

1. The verdict is not against the law and evidence.

2. There was no evidence for the defendants wrongly rejected. The statements said to have been made by Captain Taylor at various times in opposition to the evidence he gave in his examination *de bene esse* were not admissible against the owner, Mr. Munro. They would not have been admissible against his own landlord, and *a fortiori* they were not admissible against Mr. Munro: *Regina v. Bliss*, 7 A. & E. 550; *Papendick v. Bridgewater*, 5 E. & B. 166; *Scholes v. Chadwick*, 2 M. & R. 507.

I am of opinion also the decision must be against the 3rd and 4th grounds.

The 5th as to damages. They are not excessive. The defendants' conduct was very high handed, and it was prejudicial to the rights and business of the plaintiffs.

The 6th ground of the rule has ten sub-divisions against the charge of the learned Judge who tried the cause, who it is said should have told or should not have told them all that is contained in these numerous sub-divisions. The first subsection is, the plaintiff should have proved the driving of the piles on his lot and the erection of a house upon them for keeping boats in was within the regulations and limitations referred to in the statute.

These regulations, it is well known, have no relation to such matters, but relate to filling in and paying for the construction of the Esplanade, and if there had been anything in the objection we should have allowed evidence to have been produced by the plaintiffs when the case was argued before us.

The other sub-sections of the rule have all, in effect, been disposed of, we think. Not one of them can be sustained, or is sustainable.

The parties have handed in a list of cases on which they rely, besides those referred to in the argument, to most of which we have referred. These memoranda I have put among the Papers in the cause for further reference if neces-

sary. While it cannot be said the defendants, and those from whom they claim, have exercised the right such as it is *nec clam* or *nec vi*, I think it cannot be said, so far as time can apply, to any part of the right, it was *nec precario*, for the use, such as it was, was by sufferance; that is, it was *precarious*, that is, depending on the mere will of another: see per Willes, J., in *Gavel v. Martyn*, 19 C. B. N. S., at p. 745, and per Erle, J., in *Eaton v. Swansea Water Works Co.*, 17 Q. B. 275.

On the general law I may also refer to *Bell v. The Corporation of Quebec*, L. R. 5 App. Cas. 84; *Lord Blantyre v. Clyde Navigation Trustees*, L. R. 6 App. Cas. 273; *Marshall v. Ulleswater Steam Navigation Co.*, L. R. 7 Q. B. 166; *Dirk Gysbert Van Breda v. Silberbauer*, L. R. 3 P. C. 84; *Bennison v. Cartwright*, 5 B. & S. 1; *Marshall v. Ulleswater Steam Navigation Co.*, 3 B. & S. 732.

The order and motion of the defendants will be discharged, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

Discharged, with costs.

[QUEEN'S BENCH DIVISION.]

HUNTER V. GILKISON.

Indian lands—Trespass—Indian superintendent—Jurisdiction—Conviction—Discharge on habeas corpus—Action for malicious prosecution..

Held, that the defendant, who was a Visiting Superintendent and Commissioner of Indian affairs for the Brant and Haldimand Reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in the County of Brant.

Held, also, that the discharge of the plaintiff from custody on *habeas corpus* was not a quashing of his conviction on the above charge ; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been so ; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause.

The statement of claim was, that plaintiff was a farmer, and defendant the Visiting Superintendent and Commissioner of Indian Affairs for the Brant and Haldimand Reserve : that on 12th July, 1884, at the city of Brantford, in the county of Brant, the defendant assaulted the plaintiff and gave him into the custody of a constable, and caused him to be imprisoned in the common gaol at Brantford, aforesaid, for the space of seven days : that on 12th July, 1884, at the city of Brantford, in the county of Brant, the defendant maliciously, and without reasonable and probable cause assaulted the plaintiff and gave him into the custody of a constable, and caused him to be imprisoned in the common gaol at Brantford, aforesaid, for the space of seven days, whereby, &c.

Defence : Not guilty by statute (R. S. O., ch. 73, Public Act, sec. 11 ; 16 Vic. ch. 180, Public Act, sec. 9 ; 43 Vic. ch. 28, Dom. Public Act, sec. 27 ; 44 Vic. ch. 17, Dom. Public Act, sec. 12 ; 45 Vic. ch. 30, Dom. Public Act, sec. 3.)

Issue.

The cause was tried at the last Fall Assizes at Brantford, by Rose, J., with a jury.

The plaintiff was arrested and committed to the common gaol of the county of Brant, on the 12th July, 1884, under the following warrant :

WARRANT OF COMMITMENT.

CANADA, PROVINCE OF ONTARIO, COUNTY OF BRANT. To Wit :	}	To all or any of the constables or other peace officers of the county of Brant, and to the keeper of the common gaol of the said county.
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Whereas James Hunter, late of the township of Tuscarora, was this day convicted before the undersigned, J. P. Gilkison, Visiting Superintendent of Indian Affairs in and for the said county of Brant, for that he did on the 22nd February, 1883, in the township of Tuscarora, an Indian Reserve in said county of Brant, remove cordwood from said Reserve, contrary to the Indian Act of 1880, Wm. Wedge being the informant ; and it was thereby adjudged that the said James Hunter for his offence should forfeit and pay the sum of fifteen dollars, and should also pay the sum of six dollars and seventy-five cents for costs in that behalf ; and it was thereby further adjudged that if the several sums should not be paid forthwith the said James Hunter should be imprisoned in the common gaol of the county of Brant, at the city of Brantford, in the said county, and there kept at hard labour for the space of thirty days, unless the said several sums should be sooner paid ; and whereas the time in and by the said conviction appointed for the payment of the said several sums hath elapsed, but the said James Hunter hath not paid the same or any part thereof, but therein hath made default. These are therefore to command you the said constables or peace officers, or any of you, to take the said James Hunter and him safely convey to the common gaol at Brantford, aforesaid, and there deliver him to the keeper thereof, together with this precept ; and I do hereby command you the said keeper of the said common gaol to receive the said James Hunter into your custody in the said common gaol, there to imprison him and keep him at hard labour for the space of thirty days, unless the said several sums shall be sooner paid, and for your so doing this shall be your sufficient warrant.

Given under my hand and seal this 7th day of April, in the year of our Lord 1883, at Brantford, in the county of Brant, aforesaid.

Fine.....	\$15 00
Costs per C..	6 75
Extra C	2 00
	<hr/>
	\$23 75

J. P. GILKISON,
 Vis. Supt. and Comm.,
 Indian Affairs.

It was admitted that the plaintiff was released on a writ of *habeas corpus*, and the following order was put in :

IN THE HIGH COURT OF JUSTICE,

QUEEN'S BENCH DIVISION.

THE QUEEN V. JAMES HUNTER.

IN CHAMBERS,

BEFORE THE HON. MR. JUSTICE ROSE.

Upon the application of the above named James Hunter, upon reading the writ of *habeas corpus* directed to the keeper of the common gaol for the county of Brant, dated 16th day of July, instant, commanding him to produce before this Court the body of the said James Hunter, and upon reading the return thereto, and the affidavit of Valentine Mackenzie, and the copy of the information annexed, and the warrant of commitment, it is ordered that the said James Hunter be forthwith discharged out of custody of the sheriff and keeper of the common gaol for the county of Brant.

(Signed) JOHN E. ROSE, J.

It did not appear for what particular cause the detention of the plaintiff was held to be illegal.

Notice of action was put in and proved, in which it was stated the plaintiff would "cause a writ of summons to be issued out of the Queen's Bench or Common Pleas Division of the High Court of Justice."

The defendant put in an exemplification of a commission, dated the 9th of March, 1864, appointing him and others commissioners under and for the purposes of the Act, Consol. Stats. of U. C., ch. 81, and he swore that this commission had never been revoked, that it was the commission under which he had always acted, and that he was a visiting Superintendent-General and Commissioner of Indian Affairs.

The plaintiff was asked, "Could anything have been made out of your goods and chattels?" and to this he answered, "Yes." The defendant said that he did not think that he made any enquiry before he signed the warrant whether the plaintiff had any goods and chattels out of which the fine might have been levied.

Evidence was given on both sides as to whether or not the warrant was sealed at the time it was issued.

The learned Judge left two questions only to the jury: 1st, whether the warrant was sealed; and 2nd, what amount of damages the plaintiff had sustained. The

jury found that the warrant was sealed, and that the plaintiff's damages were \$500.

The learned Judge gave judgment, dismissing the action, with costs.

December 11, 1884, *Mackenzie*, Q. C., moved to set aside the said judgment, and to enter judgment for the plaintiff, on the ground that the defendant in his pleadings did not bring himself within the Act R. S. O. ch. 73, and having failed to shew himself a public officer or one empowered to do the act complained of, could not therefore invoke, nor was he in any event entitled to the protection of that Act that the obligation to quash the conviction before action which the Act created, contemplated a cause of action arising out of an act of a Justice of the Peace, and applied only to the quashing of a conviction of a Justice of the Peace within the meaning of the Summary Convictions Act, 32-33 Vic. ch. 31, and such obligation presupposes the making or framing of an instrument that should conform substantially in its tenor to one or other of the forms in that behalf which are appended to the Act: that the so-called conviction of the plaintiff under the circumstances must be taken to have been that recited in the commitment, which being, as so recited, defective, the release of the plaintiff or the *habeas corpus* operated to quash: that the recitals in the commitment of the style and authority of the convicting justice and committing person disclosed no jurisdiction so to convict or commit, and conveyed no assurance that the locality where the offence was committed was within the jurisdiction either of the convicting justice, or of the person so committing: that it did not appear that the commitment was signed within the jurisdiction, or was executed by the constable therein, or that the plaintiff was detained in a place of confinement within the jurisdiction of the person committing: that the nature of the defendant's jurisdiction as a justice of the peace prescribed by the Indian Act, 1881, was opposed to the common law conception of the office: that the evidence shewing that at th

time the plaintiff was delivered into the custody of the gaoler the commitment bore no seal, and that the defendant was at such time made acquainted with the circumstance, he was liable to trespass: that the commission put in by the defendant at the trial, even if unrevoked, could afford him no protection in the doing of the act.

McKenzie, Q. C., supported the motion. The defendant is not protected by the Statute R. S. O. ch. 73, he not being a justice of the peace within the meaning of the *Act relating to the duties of justices of the peace out of sessions with regard to summary convictions and orders*. Defendant could not sit *in* sessions, and the office of a justice of the peace obviously demands the performance of functions *in* sessions, as well as *out of* sessions. In any event, the act was not the act of a justice of the peace, but arises out of the exercise of the power of commitment claimed to be given to the defendant under section 27 of the Indian Act of 1880. The defendant failed to show himself a public officer, or one empowered to do the act complained of. He put in at the trial a commission under the great seal vesting him with authority in respect only of transactions connected with the Act by virtue of which the commission issued. The commission became revoked by the operation of the Act of 1868 regulating the bureau of the Secretary of State, and the defendant is not helped by reference, or cannot appeal for indemnity, to any clause of the Interpretation Act, the manner of appointment having been altogether readjusted. The defendant, in any case, could not shew his authority by evidence extrinsic to the commitment, and this recites no authority which could protect him. See *McLellan v. McKinnon*, 1 O. R. 219; *Dickinson's Quarter Sessions*, p. 889. The office of a justice of the peace is not attached to the person. The Indian Act, apparently, assigns no territorial limit to the jurisdiction of its appointees as *ex-officio* justices of the peace. Even if there were a necessity for quashing the conviction, the release of the plaintiff on a *habeas corpus*, the commitment founded on and reciting a bad conviction, operated to

quash it: *Chany v. Payne*, 1 Q. B. 712; *Charter v. Greame*, 13 Q. B. 216. The conviction is bad on many grounds: 1. Cordwood is not comprehended in the different descriptions of wood enumerated in the section under which the proceedings were had: *Regina v. Caswell*, 33 U. C. R. 303. 2. It does not negative the possession by the plaintiff of a license, or that the offence was not the act of an Indian of the band: *Paley on Conv.* 217. 3. It does not allege the quantity of, or value of, the wood removed: *Charter v. Greame*, 13 Q. B. 216; *Paley on Conv.*, p. 239. In imposing a penalty of \$15 the adjudication does not accord with either of the states of things which might arise under the section. It imposes imprisonment at hard labour: *Regina v. Washington*, 40 U. C. R. 221. The commitment is likewise bad on many of the same grounds; and besides it does not appear to have been signed within the jurisdiction, or direct a committal to the proper quarter. It does not set forth a sufficient style and authority in the defendant.

Robertson, Q.C., contra. The defendant is the Commissioner of Indian affairs at Brantford, and as such is *ex officio* a justice of the peace, (Consol. Stat. U. C. ch. 81 sec. 9) within the county within which for the time being he may be resident or employed as such commissioner. He has also all the powers of a police magistrate. The defendant's commission, although dated in 1864, was continued under confederation: see B. N. A. Act, sec. 129. He gave evidence at the trial that his commission is still in force. He is also an Indian Agent. The warrant of commitment recites that plaintiff was convicted before defendant. This warrant was issued by defendant for the purpose of enforcing the conviction. As to jurisdiction, it is of no consequence: he acted *bond fide*. Plaintiff cannot bring an action against a Justice for any thing done in discharge of his duty under a conviction until the conviction is quashed: R. S. O. ch. 73, sec. 4, as amended. It is said he had no power to enforce the conviction, that it could only be enforced by the Superintendent General of

Indian Affairs; but though the Superintendent General can issue his warrant in case of default, the convicting Justice is not deprived of his undoubted right to enforce his conviction. The Summary Convictions Act, (32-33 Vic. ch. 31, D.) authorizes any justice of the peace, before whom a complaint is made "*in relation to any matter over which the Parliament of Canada has jurisdiction,*" (sec. 1,) to issue his warrant, &c., and establishes the procedure for enforcing &c. This was such a matter, and defendant having been seised of the case had authority to enforce the conviction. The argument and cases cited for plaintiff might be applicable if this was a motion to quash the conviction, but not to this case. Until quashed the conviction protects the Justice for any thing done by him under it. The defendant was appointed under the old law, and no one having been appointed in his stead under the new law, he had all the powers which he had under the old law. That being so, see Consol. Stat. ch. 81, sec. 30, under which defendant had all the power to commit &c.

March 7, 1885. ARMOUR, J.—By Consolidated Statutes of Upper Canada ch. 81, under and for the purposes of which the defendant was appointed a commissioner, it is provided that "the commissioners and all acting under their authority shall respectively have the same privilege and protection in respect of any action or suit brought against them for any act by them done in the execution of their office that justices of the peace, sheriffs, gaolers, or peace officers respectively have:" sec. 17; and that "the said commissioners, and each of them, and the different superintendents of the Indian Department, either now in office or hereafter appointed, shall, by virtue of their office and appointment, and without any other qualification, be justices of the peace within the county within which, for the time being, they may be respectively resident or employed as such commissioners or superintendents:" sec 19. So much of this Act as related to Indians, or Indian lands, was repealed by the Act 39 Vic. ch. 18 sec. 99, D.; but

the provisions above quoted were preserved, and are R. S. O. ch. 27, secs. 17 and 20.

The Act 39 Vic. ch. 18 was amended by 42 Vic. ch. 34, and was repealed by 43 Vic. ch. 28, sec. 112, O.

The Act 43 Vic. ch. 28, as amended by 44 Vic. ch. 17, and by 45 Vic. ch. 30, was the law in force when the conviction in question was made.

By the Act 43 Vic. ch. 28, sec. 2, sub-sec. 11, the term "agent" includes a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general.

By the Act 43 Vic. ch. 28, sec. 27, as amended by 45 Vict. ch. 30, sec. 2, which is the section under which the conviction in question was meant to be made, the conviction is to be before any stipendiary magistrate, police magistrate or any two justices of the peace.

By the Act 44 Vic. ch. 17, sec. 6, D.: "Any one judge, judge of sessions of the peace, recorder, police magistrate, district magistrate, or stipendiary magistrate, sitting at a police court or other place appointed in that behalf for the exercise of the duties of his office, shall have full power to do alone whatever is authorized by the Indian Act, 1880 (43 Vict. ch. 28), to be done by a justice of the peace, or by two justices of the peace;" and by sec. 12, "Every Indian Commissioner, Assistant Indian Commissioner, Indian Superintendent, Indian Inspector, or Indian Agent, shall be *ex officio* a justice of the peace for the purposes of this Act."

By the Act 45 Vic. ch. 30, sec. 8, "Wherever in the Indian Act, 1880 (45 Vic. ch. 28), or in the Act passed in the 44th year of Her Majesty's reign chaptered 17, amending the said Act, or in this Act, power is given to any stipendiary magistrate or police magistrate to dispose of cases of infraction of the provisions of the said Acts brought before him, any Indian agent shall have the same power as a stipendiary magistrate or a police magistrate has in respect to such cases."

The term Indian agent as above used includes, as we

have seen, a commissioner and a superintendent, and the defendant was a commissioner and superintendent, and could therefore convict alone under 43 Vic. ch. 28, sec. 17.

The defendant was also, by virtue of his being a commissioner and a superintendent, *ex officio* a justice of the peace, not only by virtue of 44 Vic. ch. 17, sec. 12, but also by virtue of the R. S. O. ch. 27, sec. 20, and as such was entitled to the protection of the R. S. O. ch. 73.

The defendant, in making the conviction in question, acted in the *bonâ fide* belief that as a justice of the peace he had the power to make it (it was not contended that he acted maliciously); and whether, therefore, he acted without jurisdiction, or in excess of it, he is equally entitled to such protection.

Being entitled to such protection, this action was not maintainable against him until the said conviction had been quashed either upon appeal or upon application to one of the Superior Courts of Common Law.

But it is contended that the fact that the plaintiff was discharged upon *habeas corpus* from custody under the warrant of commitment issued upon this conviction, was *ipso facto* a quashing of the conviction, and *Chaney v. Payne*, 1 Q. B. 712, and *Chester v. Greame*, 13 Q. B. 216. were cited in support of this contention; but these cases have nothing to do with it, nor could they, for the convictions in them were made before the passing of the Act 11 & 12 Vic. ch. 44, which for the first time provided that no action should be brought until the conviction had been quashed.

They decided another point altogether, fully discussed in *Regina v. Bennett*, 3 O. R. 45.

The Judge, upon the return to the writ of *habeas corpus*, has nothing before him but the commitment, and I think it would be going too far to hold that in such a case the conviction which was not before him would be quashed by the discharge of the prisoner from custody under the commitment.

The discharge might take place because the commitment was not warranted by the conviction which was recited in it, or because it was in itself defective, as was said to have been the case here.

In my opinion the conviction in this case was not quashed by the discharge of the plaintiff from custody under the commitment, and the judgment of the learned Judge must be affirmed, and the motion dismissed, with costs.

WILSON, C. J.—I understand the principal question to be, whether the defendant, who is a Visiting Superintendent and Commissioner of Indian Affairs for the Brant and Haldimand Reserve, had as such Superintendent and Commissioner authority to act as a justice of the peace in and for the county of Brant, or at any rate to act as a justice of the peace in and about this particular matter, a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in Tuscarora, in the county of Brant.

The commission to the defendant was given under the authority of the Consol. Stat. U. C. ch. 81.

The offence is one which is against the terms of the second and thirtieth sections of that Act. The whole of that Act, so far as relates to Indian lands, was repealed by the 39 Vic. ch. 18, sec. 99, D. A provision at the end of that section is, "And this Act shall be construed not as a new law, but as a consolidation of those hereby repealed, in so far as they make the same provision that is made by this Act on any matter hereby provided for."

By sec. 3, sub-sec. 10, the term "Superintendent-General" means the Superintendent-General of Indian affairs.

Sub-section 11: The term "agent" means a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general.

By the 43 Vic. ch. 28, sec. 112, the Indian Act of 1876 is repealed. There is the like provision at the end of that section that there is at the end of the Act of 1876: "And this Act shall be construed not as a new law, &c."

And by section 2 of the Indian Act of 1880, sub-section 11, "the term "agent" includes a commissioner, &c., as in the Indian Act of 1876 sec. 3, sub-sec. 11.

The Act of 1880 is the Act still in force, but it has been amended by the 44 Vic. ch. 17, sec. 6, which authorizes among other persons police magistrates to act under the Indian Statute of 1880, and to do alone whatever is authorized by that Act to be done by one or two justices of the peace; and such police magistrate, &c., by section 7, shall have jurisdiction, under the Act of 1880, over the whole county or union of counties or judicial district in which the city or town for which he has been appointed or in which he has jurisdiction, is situate. And by section 12, "Every Indian commissioner, assistant Indian commissioner, Indian superintendent, Indian inspector, or Indian agent shall be *ex officio* a justice of the peace for the purposes of this Act."

Then the 45 Vic. ch. 30, sec. 3 enacts that, "Whenever in the Indian Act of 1880 or in the 44 Vic. ch. 17, or in this Act, power is given to any stipendiary magistrate or police magistrate to dispose of cases of infraction of the provisions of the said Acts brought before him, any Indian agent shall have the same power as a stipendiary or a police magistrate has in respect to such cases."

I think the defendant had jurisdiction as a magistrate and that he had jurisdiction over the offence; and I have no doubt the discharge of the plaintiff from custody was not a quashing nor equivalent to a quashing of the conviction in this case; in fact the plaintiff was discharged from custody upon the supposed ground which turned out not to be the fact, that the warrant of commitment was not under seal.

The conviction remaining still in full force, and the defendant having jurisdiction, the action should have been on the case, while it has been brought for a trespass, and if the form of action had been right, the allegation of malice and the want of reasonable and probable cause had not been proved; and the judgment was rightly rendered for the defendant.

I am of opinion, therefore, the order *nisi* must be discharged, with costs.

O'CONNOR, J., concurred.

Order nisi discharged, with costs.

[QUEEN'S BENCH DIVISION.]

GIBBON V. MICHAEL'S BAY LUMBER COMPANY
[LIMITED].

Charter—Demurrage—Computation of Time—Sunday.

Held, reversing the judgment of ARMOUR, J., at the trial (ARMOUR, J., dissenting,) that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed.

ACTION to recover \$700, which the defendants deducted from the plaintiff's account against them for railway ties and posts which he had delivered to them.

The defendants alleged they paid that sum to one Captain Sullivan, on account of the alleged delay of the plaintiff in loading the said ties and posts on board two barges, the "Maggie" and the "Crier," chartered by the defendants for that purpose; but the plaintiff said there was no delay for which he was answerable to the defendants, and he never authorized them to pay that sum to the said Sullivan.

The defendants said they chartered the two barges for the purpose aforesaid: that the vessels were to proceed to Manitoulin Island, and there load, and then proceed to Chicago with the ties and posts, and deliver the same there, and that three running days were to be allowed to the defendants for loading the barges: that the barges ar-

rived at West Bay, Manitoulin Island, on or about the 25th of July, 1884, and upon notice of the terms of the charter party being given to the plaintiff he accepted the said terms, and agreed to become bound thereby, and agreed with the defendants to load the said vessels within three running days from the time of their arrival as aforesaid; and in the event of his not loading within that time he agreed to pay \$100 a day demurrage for any detention over and above the said three days allowed for loading: that the vessels were not loaded within the three days, but ten days were occupied in the loading, whereby the plaintiff became and was liable to pay to the captain of the vessels demurrage for such detention for the seven days: that the captain refused to deliver the ties and posts to the defendants at Chicago until he should be paid the sum of \$700 for his demurrage, which sum the defendants paid to him.

Issue.

The cause came on for trial before Armour, J., at the Fall Assizes, at Owen Sound.

The sum of \$500 was disallowed to the plaintiff, and judgment for \$200 was given for him, the learned Judge having, after reserving the case, given the following judgment:

"I reserved this case at the trial because of the doubt I entertained whether the shipowner could properly, under the terms of the charter, and under the circumstances given in evidence, charge demurrage for the Sunday, and whether, having regard to the fact that the charter was made with the knowledge of both parties that the ships were to be loaded off shore, the shipowner could charge demurrage for delay in loading caused by tempestuous weather.

I am satisfied, on the evidence, that the terms of the charter were those deposed to by captain Sullivan, and I am of the opinion that the three days in which the ships were to be loaded were understood by both parties to be working days, and the refusal of the captain of one of the ships to work on that day disentitled the shipowner, in my opinion, to charge demurrage for that day.

I am of opinion that the charterer, under the terms of the charter, was bound to load in three days, and that he must be subject to the loss of time occasioned by the tempestuous weather.

The ships were not at the place of loading until Tuesday, the 15th of July, and were not loaded till Thursday night, the 24th July, so that six days demurrage was chargeable, amounting to \$600; the shipowner charged for seven days, amounting to \$700, but for Sunday, in my opinion, he ought not to have charged, and the \$700 included Sunday.

The defendants charged the plaintiff with \$700 for demurrage. They were, I think, only entitled to charge him \$600; but this sum, I think, under the evidence, he was liable to pay. They also charged him with \$100 for shortage, and this they had no right to charge him at all.

I think, therefore, that the plaintiff is entitled to recover in this suit \$200 and interest from July 25th, 1884, equal to \$206."

The defendants gave notice of motion with respect to the \$200.

Lount, Q. C., supported the motion. The defendants say the \$200 should not have been found for the plaintiff. That sum is made up of two sums of \$100 each. One of these sums is for shortage in the plaintiff's delivery of a full cargo, the defendants having to put on board 3,314 of their own ties to complete the loading, and the other \$100 is for one day's demurrage, which should have been allowed to the defendants more than had been allowed to them. That day was a Sunday, the question being whether the Sunday should have been allowed for as a day of demurrage. The loading began on a Tuesday, and was not finished till Thursday of the following week, being ten days, from which the three running days must be deducted, leaving seven days of detention.

He cited the following cases as to the demurrage: *Abbott on Shipping*, 12th ed., 243; *Brown v. Johnson*, 10 M. & W. 331; *Niemann v. Moss*, 29 L. J. Q. B. 206, S. C., 6 Jur. N. S. 775; *The Commercial Steamship Co. v. Boulton*, L. R. 10 Q. B. 346; *Mann and Pollock on Shipping*, 4th ed., 411; *Angerona*, 1 *Dodson's Adm. R.* 382.

As to shortage. That sum was deducted in the account rendered to the plaintiff, and he signed it without prejudice only to the *demurrage* charged to him.

Falconbridge, shewed cause. The Sunday should not be allowed for under the terms of the charter in any event; and the captain of the "Maggie" refused to load on that day. He referred, in addition to the cases already cited, to *Cochran v. Retberg*, 3 Esp. 121; *Lawes on Charter-Parties*, 131.

March 7, 1885. WILSON, C. J.—The learned Judge did not allow the charge for demurrage for the intervening Sunday. It appeared also the Master of one of the two vessels refused to work on that day. Nor did the learned Judge allow the shortage charged.

As to the shortage captain Sullivan was asked, "Did you abandon the shortage?" and he answered, "I did."

That sum should not, therefore, have been deducted by the defendants, even although the plaintiff had contracted with the shipowners for a full delivery. It is no doubt the case that the defendants had to send 3,314 ties of their own, for which they had paid two cents a tie more than they had paid to the plaintiff to make up a full cargo, by reason of the plaintiff's short delivery, and that they would have made \$66.28 more upon that number of ties they had to supply if the plaintiffs had delivered that number to complete the loading, and so they would. If the plaintiff's contract was with the defendants to deliver for them on board of these boats as many ties as would make a full cargo for each boat, that would be equivalent to an agreement to sell him as many ties as would make a full cargo for each boat, and as the plaintiff failed to do that he would be answerable to the defendants for the two cents a tie he was short in his delivery, whether the boat owners charged or could charge the defendants for shortage or not.

There is, however, no express contract by the plaintiff to deliver to the defendants any specific number of ties. The plaintiff's contract was with the ship owners to give them

a full load, and upon that contract the shipowners have made no claim for a short delivery, and the defendants cannot therefore make a charge against the plaintiff as for a payment made by them to the shipowners, when the shipowners have made no such claim upon the plaintiff: the \$66.28 cannot therefore be allowed in any case.

As to the computation of the Sunday against the plaintiff as one of the demurrage days, the question is, should the refusal by the master of the "Maggie" to load upon that Sunday disentitle the defendants to any deduction from the plaintiff's account for the \$100 demurrage, or for a part of the \$100 of the demurrage for that vessel for that day?

Upon the general question, whether the Sunday is to be reckoned as one of the days to be allowed for, the rule appears to be that "*days* and *running* days mean the same thing, viz.: consecutive days, unless there be some particular custom to the contrary. If the parties wish to exclude any days from the computation, they must be expressed." *Brown v. Johnson*, 10 M. & W. at p. 334. In that case 25 *running* days were allowed for the loading at Honduras, and 15 days for unloading in the United Kingdom, and demurrage was allowed for the time beyond the 15 days for discharge. Now there can be no difference in demurrage, whether it is for the loading or for the unloading. In *Niemann v. Moss*, 6 Jur. N. S. 775, the like rule was followed in the loading of the ship at Liverpool.

In *Commercial Steamship Co. v. Boulton*, L. R. 10 Q. B. 346, "loading and discharging the ship as fast as the steamer can work, but a minimum of seven days to be allowed merchants', must mean working days; therefore the Sunday is excluded." "Days," or "running days," are expressions used in opposition to "working days," unless there be a custom to the contrary.

In the case just mentioned demurrage was allowed to the vessel, not because Sunday was in question, but because all the lay days had been exhausted at the port of loading, and there were none to spare to the shipper at the port of discharge at London.

The Sunday in question should therefore be allowed to the defendants, unless the refusal of the master of the "Maggie," to work upon that day prevents the defendants from charging demurrage at all, although the other master did not refuse, or unless there should be a part deduction only made for the \$100, the demurrage per day for the two vessels.

I am of opinion the refusal of the master of the "Maggie" to work upon that day has no effect upon the claim for demurrage. When Sunday is not computed as one of the demurrage days, it is not because in England or in this country work is prohibited to be done upon that day, but because by the contract it has been expressly excluded from the computation named, or by the time being restricted to working days ; and it is, as the cases already referred to shew, computed as a demurrage day, although the law will not suffer the work either of loading or of unloading to be done on that day. In the case of *Brown v. Johnson*, 10 M. & W. at p. 333, the fact of its being prohibited to work in London on Sunday is referred to, but yet the Sunday was allowed for as a demurrage day.

There is good reason why this Sunday should be reckoned as well as any other day in such a case, and it is that upon that day, as well as upon any other day, the vessel might be engaged upon her voyage but for the detention in port ; and the loss of that day in port is just as much an injury to her owners when she might be prosecuting her voyage as her detention in port upon any other day. I think, therefore, the \$100 for the Sunday which was allowed to the plaintiff should be deducted, and that the judgment should stand for the plaintiff for the sum of \$100 only, that is, for the \$100 which was deducted for the stoppage, and that there should be no costs of this motion to either party, and that the judgment should be entered for the plaintiff for \$100, without costs.

ARMOUR, J.—If, under the charter made at Chicago, the master of the vessels had arrived at the place of loading

on Saturday night, I do not think that the three days would have ended on Tuesday night, but on Wednesday night: Sunday would, I think, be excluded. If the charter made at Little Current had been to load in ten days, the ten days would, in my opinion, have ended on Friday night and not on Thursday night, Sunday being excluded, and the fact that the charter was made on Monday night for three days cannot make the construction to be put on it different from what would be put on a charter made there on Monday night for ten days; and in its result the charter is as if it had been made for ten days, for the master elected to stay and wait for his load the additional time, and to look to his claim for demurrage for compensation.

I adhere to my former opinion.

O'CONNOR, J., concurred with Wilson, C. J.

Order accordingly.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE QUEEN'S BENCH, THE CHANCERY AND COMMON
PLEAS DIVISIONS
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO.

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

ALIMONY.

Action for—Desertion—Offer to return—Pleading—R. S. O. ch. 40, sec. 48.]—See HUSBAND AND WIFE, 4.

APPEAL.

To Quarter Sessions of Renfrew.]—See SESSIONS.

ARBITRATION AND AWARD.

1. *Agreement to refer—Staying action—Costs of arbitration.]—On an application by an insurance company to stay proceedings, in an action upon a policy, pending an arbitration as to the amount of loss under the statutory condition, the Court granted a stay on the company admitting its*

liability on the policy ; and further ordered, but without defendant's consent, that either party might, after the award, apply to the Court in respect of the costs of the arbitration. On a subsequent application an order was made by a Judge in Chambers on defendant to pay a part of such costs.

Held, that the Court had jurisdiction to deal with the costs ; and moreover, that defendants having submitted to the order of the Court, and taken the benefit of it, could not object to the order of the Judge made under it. *Hughes v. The British America Insurance Co., and Hughes v. The London Assurance Co.*, 465.

2. *Insurance—Reference to arbitration—Costs of arbitration and award.]—After an action had been commenced on a policy of insurance the defendants gave notice of arbitration under the statutory condition, when the Court made an order that,*

on the defendants abandoning all defences and admitting their liability under the policy sued on, all proceedings in the action should be stayed, the plaintiff to sign final judgment and proceed in the action for the amount which might be awarded him, together with the costs of the action, &c. And it was further ordered, without the consent of the defendants, that either party, after the making of said award, might apply to a Judge in Chambers in respect of the payment of the costs of the reference and award. The arbitrators awarded to the plaintiff the full amount of his claim. On application to ROSE, J., an order was made directing the defendants to pay the costs of the reference and award.

On appeal to the Divisional Court, CAMERON, C. J., was of opinion that the appeal should be allowed, there being no jurisdiction over the costs on such a reference, and GALT, J., that it should be dismissed.

The Court being equally divided, the judgment was affirmed. *Hughes v. The Hand-in-Hand Ins. Co.* 615.

ASSESSMENT AND TAXES.

1. *Vendors and Purchasers Act—R. S. O. ch. 109—Tax title—Necessary proof—Treasurer's books and returns—Treasurer's certificate.*]—On an application under the Vendors and Purchasers Act, R. S. O. c. 109, to compel a purchaser to carry out a purchase, it was shown that the vendor claimed through a tax sale, and had declined to produce any further evidence of the validity of the tax sale than the Treasurer's deed, and what might be obtained from the Treasurer's books, returns and warrants, to which he referred the purchaser.

Held, that the Treasurer's lists of lands in arrear for taxes furnished to the Warden would be as valid evidence of the non-payment, as the Treasurer's warrant to the Sheriff under 16 Vic. c. 182, s. 55, was held to be by the judgment in *Clarke v. Buchanan*, 25 Gr. 559; and that coupled with the warrant from the Warden they would be conclusive, and would afford evidence of non-payment up to the time of the sale.

Held, also, that the certificate of the Treasurer that the land was not redeemed is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty. More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton, and Lot No. 6. on Plan No. 580, in the County of York*, 29.

2. *Municipal law—Taxation of premiums of foreign insurance company—Agent—Income—Insurance—Assessment—43 Vict. c. 27, O.*]—The plaintiff company was a foreign corporation with its head office in England, but carrying on insurance business in Canada, with an agency office at Kingston, Ontario, and the head office for Canada at Montreal.

Held, that insurance premiums received at Kingston by the agent of the company there, for insurance business transacted through him as such agent, were, under, 43 Vict. c. 27, O., assessable at Kingston as taxable income or personal property against the company and its said agent, although the agent paid taxes on his own income, which was partly derived from commissions on premiums received, and the fact that the premiums, having been previously sent by the agent, after collection,

to the head office in Montreal, were not in the municipality of Kingston, when the assessment was made, did not make any difference. *The Phoenix Ins. Co. of London et al. v. The Corporation of the City of Kingston et al.*, 343.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Assent of creditor—Estoppel.]—*See* BANKRUPTCY AND INSOLVENCY, 3.

ASSURANCE.

Administrator's right to sue for moneys payable in a foreign state.]—*See* EXECUTORS AND ADMINISTRATORS, 1.

ATTACHMENT OF DEBTS.

Garnishee proceedings—Debtor and creditor—Attaching plaintiff not a "creditor" of garnishee—Evidence of official documents—27 Vic. c. 57, s. 10.]—A judgment creditor does not, properly speaking, become a creditor of the garnishee by service of an attaching order upon the latter. The garnishee continues to be debtor to his own creditor, the judgment debtor, until he has paid the amount owing into Court, or to the attaching creditor, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied.

Held, therefore, that the plaintiff, who had obtained a garnishee order, garnishing a debt due from the Brockville and Ottawa Railway Company to W. S., his judgment debtor (which railway was now represented

by the defendants), was not a "creditor" of the said company, holding a *bonâ fide* claim against it within 27 Vic. c. 57, s. 10.

A copy of an order and of a writ of execution issued pursuant thereto admitted in evidence, an official in the office where the same had been filed testifying that he had made the copies from the originals, which were proved to have been lost.

A memorandum or entry in a book in the office of a sheriff, in the handwriting of the deputy sheriff, purporting to be an entry of the receipt of a certain writ by the sheriff, admitted in evidence, subject to objection, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting and the place from which the book was produced. *Wardrope v. The Canadian Pacific R. W. Co. et al.*, 321.

BANKRUPTCY AND INSOLVENCY.

1. *Fraudulent preference—Pressure—R. S. O. ch. 118.*]—The H. Company being indebted to the plaintiffs in about \$4,750, application was made by letter and verbally by the latter, insisting upon payment or security. The company, which, to the knowledge of the plaintiffs, was hopelessly insolvent, thereupon gave a chattel mortgage to the plaintiffs, covering all their available assets. The mortgage recited that the plaintiffs had agreed to loan the company \$5,000 on the said security, but the arrangement was that the plaintiffs should deduct the amount of the debt due them out of the pretended loan.

Held, that the above was a fraudulent preference, and there was no

such *bond fide* pressure as exempted the case from the provisions of R. S. O. ch. 118. *Long et al. v. Hancock et al.*, 154.

2. *Creditor's action—Fraudulent preference—Pressure—R. S. O. ch. 118, sec. 2.*—Where it was sought to set aside a bill of sale of personal property as fraudulent and void, as against the creditors of the grantor, and the evidence shewed that it was reluctantly given by the debtor, who only yielded after some delay, and to a continuous insistence on the part of his creditor, his intent being to escape his creditor's importunity, and that the demand of the creditor was made *bond fide*, with no intent but to obtain the security, which she was advised she ought to have.

Held, affirming the decision of Proudfoot, J., that the bill of sale was not void under R. S. O. ch. 118, sec. 2.

Under the above section the intent with which the conveyance, or gift in question was made, must be looked at, and if it was obtained as the result of honest pressure on the part of the creditor, that rebuts the presumption of an intent on the debtor's part to act in fraud of the law. *Slater v. Oliver et al.*, 158.

3. *Assignment for creditors—Assent of creditors—Estoppel.*—After the execution of a deed of assignment for creditors the assignee called a meeting of the creditors, at which the defendant, a creditor, attended and assented to a resolution appointing him one of the trustees to aid the assignee in winding up the estate; and a resolution was also passed to pay certain arrears of wages; and he examined and reported on the amount and condition of the stock. A few days afterwards he brought an action

on his claim covered by the assignee's deed.

Held, that the assignee was estopped from denying the claim. *Gardner v.*

Principals—Ante-judgment sale—Negligence—Onus—Death of surety.—See 1

BILLS OF PROMISSORY

Debentures—Subsequent insolvency—Negotiating debentures.

Partnership—Dorsement—Partnership.

BILLS OF EXCHANGE

Sheriff's mortgage—Of sheriff's property.—*Held*, that the sheriff was not liable for the loss of the goods if he had taken care of them. *See* 1

Creek, Pigeon Lake, Sturgeon Lake, and Scugog River, and the shore adjacent thereto." The evidence shewed that the former waters were well known as such, and as distinct from and forming no part of the latter and that no part of the goods seized had ever been "in and upon" the latter :

Held, that the words in the mortgage, "now in and upon," expressly limited the goods to which they referred to those goods which were then upon the waters mentioned in the mortgage, and the shore adjacent thereto, and could not include the goods seized.

Where a sheriff, having seized goods of sufficient value to satisfy the plaintiff's execution, abandons them on being indemnified he should not get the benefit of any doubt which may be raised as to their realizing enough if sold. *Donnelly v. Hall*, 581.

BOARD OF HEALTH.

Power to pass by-law.]—See WATERS AND WATERCOURSES, 1.

BRIBERY.

A conspiracy to bribe members of Parliament is a misdemeanour at common law, and as such indictable.]—See CRIMINAL LAW, 3.

BY-LAW.

Opening a street.]—See WAYS, 1.

Drainage.]—See WATERS AND WATERCOURSES, 1.

CARRIERS.

Stoppage in transitu — Goods entered and duty paid—Refusal by carriers to deliver.]—See SALE OF GOODS.

CERTIORARI.

Removal of indictment by.]—See CRIMINAL LAW, 1.

CHARITIES.

Devises to—Mortmain—Failure of bequests — Incorporated Synods power to hold in Mortmain.]—See WILL, 2.

CHURCHES.

1. *Land held in trust for religious body—Devolution thereof—Enquiry into spiritual doctrines—Jurisdiction —R. S. O. ch. 216, sec. 10.*]—In an action brought by the trustees of the West Lake Monthly Meeting of Friends, claiming a declaration that they were entitled to certain lands in trust for the said Monthly Meeting, under a certain deed, the defendants contended that the plaintiffs represented a faction which had seceded from the West Lake Monthly Meeting of Friends, and that they, the defendants, were the true and only West Lake Monthly Meeting of Friends as it existed at the time of the deed, and that their Meeting was intended by it.

Held, that, though it was no part of the duty of this or any civil court to determine which of the conflicting doctrines, &c., held by the respective parties were true, yet, property being concerned, it was necessary to ascer-

tain who were entitled to it, and for that purpose, but for that purpose only, to inquire into their religious opinions, according to the rule laid down by Lord Eldon, in *Craigdallie v. Aikman*, 1 Dow. 1.

It is not correct to say that in case of a trust such as this, a majority can determine the devolution of the property. To determine the devolution of property there must be some certain rule to go by, and if such trust property as that in question here, could devolve upon a body, at variance in respect of many points of doctrine, from the original *cestuis que trustent*, as were the plaintiffs here, it is requisite that the whole body should have changed.

Held, upon the evidence, that the defendants' Monthly Meeting continued to be the same body in doctrine, order, and discipline, as the West Lake Monthly Meeting was at the time the trust was created, and were entitled to a declaration accordingly.

Semble, that R. S. O. ch. 216, sec. 10, as to the appointment of trustees of lands by religious bodies does not require the mode of appointment to be determined at one meeting, and the appointment itself made at another. Both things may be done at the one meeting. *Dorland v. Jones*, 17.

2. *Revocation of license to clergyman by Bishop without trial—Diocesan Court.*—The Rev. J. H. being the incumbent of a parish in the Diocese of Ontario, which was endowed, and having acted in such capacity and performed the duties thereof for several years, discontinued the services in two other churches which were attached to his parish. A commission was issued by the Bishop under the Canon in that behalf of the Synod of the said Diocese, No. 8,

“To enquire into the causes which led to the closing of the said churches, and to report whether there was lawful excuse for the said Rev. J. H.'s discontinuance of the exercise of his ministerial offices in said churches, and to report whether there was sufficient *prima facie* ground for instituting further proceedings against the said Rev. J. H. as provided by said Canon.”

The Commissioners reported that the churches had been closed “because the members of the church refused to attend and provide for the ministrations of the Rev. J. H. in these churches:” that an estrangement existed between the said Rev. J. H. and his parishioners, and they decline his ministrations. But that in their opinion (the commissioner's) the proofs adduced were not of such a nature as could be relied on to procure a conviction in an Ecclesiastical Court: and they declined to recommend the prosecution of further legal action, although they believed there was no hope of a restoration of his ministerial usefulness there, and that there was a *prima facie* ground for instituting further proceedings against him as provided by the Canon; but they were of opinion that without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said Canon being sustained.” After the making of this report, and upon the said Rev. J. H. refusing to resign his said incumbency, the Bishop, by an instrument under seal, revoked, or purported to revoke, his license, and appointed the Rev. A. F. E. as his successor, and the Synod declined to pay him (the Rev. J. H.) the annual proceeds of the endowment. Upon an action

being brought by the Rev. J. H. to compel the Synod to pay him such proceeds, it was—

Held, that the offences (if any) came within the second section of the Canon; that any one charged with such an offence has the right to be tried, under section one, by the Diocesan Court, and has the right of appeal to the Metropolitan, under section thirteen; that the Bishop had not the power to cancel and annul the license of the plaintiff, either without or for cause, without a trial by the Diocesan Court; and that the plaintiff must succeed.

Held, also, that the general word “immorality” as used in the Canon was not restricted by the words following, specifying particular offences, for such offences were not of the same nature as the general word. *Halliwell v. The Incorporated Synod of the Diocese of Ontario et al.*, 67.

3. *Trust in favour of Church—Evidence—Journals of Parliament—Proof of status as rectors—Construction of Statutes—Constitutional law—29-30 Vic. ch. 16—Imp. 31 Geo. ch. 31—Imp. 3-4 Vic. ch. 35—Imp. 17-18 Vic. ch. 118.*—The Act 29-30 Vic. ch. 16, being an Act to provide for the sale of the rectory lands of this Province, is *intra vires* and valid, the Imperial Act 17-18 Vic. ch. 118 having removed the restrictions upon legislation on such subject matter, formerly existing by force of 31 Geo. III., ch. 31, and Imp. 3-4 Vic. ch. 35.

Certain alleged copies of Journals of Parliament were tendered in evidence. It was not proved that originals of which the copies tendered were said to be copies ever existed, nor was it shewn that the copies tendered were copies of any original. They were, however, shewn to have

come from the Parliamentary library at Ottawa, and most of them purported to have been printed by the Queen's printer.

Held, that, in the absence of a statute making them admissible, they could not be received.

When certain persons sued as incumbents of certain rectories belonging to the Church of England in this Province, and it was objected that the constitution of the said rectories had not been legally proved,

Held, that evidence as to the possession or occupancy by the plaintiffs of their respective Churches, and as to their officiating according to the rules of the Church as persons having the cure of souls, and of their recognition by the Church Society or Synod, was admissible as some evidence of their *status* as such rectors.

In construing a statute it is not admissible to resort to the preamble, if the words of the statute are plain.

Held, on the whole case, which was an action brought by certain clergymen of the Church of England in the city of Toronto, for the purpose of having it declared that the defendant D. was a trustee for them as to certain lands by virtue of 29-30 Vic. ch. 16, and certain subsequent statutes, conveyances, and transactions, that the plaintiffs were entitled to the declaration asked for, and that such lands were within the description of lands in sec. 1 of said Act.

Certain evidence offered to prove the contents of a Canon of the Church Society or Synod discussed. *Langtry et al. v. Dumoulin et al.*, 499.

4. *Rectory endowments—Rectory lands—29 & 30 Vic. ch. 16—Construction—Maintenance.*—Certain land was granted by patent from the Crown, dated December 26th, 1817, to D. B., J. B. R., and W. A. as

trustees, for the sole use and benefit of the parishioners of the town of York forever, as a churchyard and burying ground for the inhabitants of the said town of York, and appurtenant to the Church then built thereon. This patent was surrendered to the Crown, and another, dated September 4th, 1820, was issued to the same trustees, reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so appropriated, and that such part of the said land as was not so required for the use of the parishioners should be held upon and for the trusts and uses therein-after stated, which trusts were as follows:—"In trust to hold the same for the sole use and benefit of the resident clergyman of the said town of York, and his successors appointed or to be appointed rectors of the Episcopal Church therein to which the said land is appurtenant, to make lease of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use," * * and when a rectory was erected and an incumbent appointed * * "the trustees should convey to such incumbent * * and his successors forever as a corporation sole to and for the same uses, and upon the same trusts."

Certain other lands were also granted by another patent from the Crown, dated 26th April, 1819, to W.D.P., J.B., and J.S., upon trust to observe such directions, and to consent to and allow such appropriation and disposition of them, and to convey the same in such manner as should thereafter be directed by Order in Council. These lands were subsequently conveyed by W. D. P., J.B., and J.S. to the other trustees,

D. B., J. B. R., and W.A., by deed, dated July 4th, 1825, reciting an Order in Council dated December 2nd, 1824, requiring the grantors to convey the said lands to the grantees for the use of the Church and of the clergyman incumbent thereon for the time being (which recital was the only evidence of the contents of the Order in Council), "upon trust, nevertheless, that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the town of York, and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal Church, according to the rites and ceremonies of the Church of England therein, to which the said lands are appurtenant," which deed contained a proviso for conveyance by the trustees, upon the erection of a parsonage or rectory and presentation thereto, in the same terms as that contained in the patent of the 4th of September, 1820.

The town of York was subsequently incorporated as the city of Toronto, and by letters patent, dated 16th January, 1836, a parsonage or rectory was erected and constituted in the said city of Toronto, designated as the first parsonage or rectory within the township of York, otherwise known as the parsonage or rectory of St. James, and 800 acres of land were set apart as a glebe or endowment, to be held appurtenant with the said parsonage or rectory, and the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or rectory of St. James, and by deed poll, dated the 10th February, 1841, reciting the patent of the 4th September, 1820, the deed of the 4th July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A., and J. G. S., the then trustees, gran-

ted the said lands described in the said patent and deed to the said the Hon. and Rev. J. S., Rector of St. James, and his successors in the said rectory forever as a corporation sole, to and for the same uses and upon the same trusts as are mentioned and expressed in the said patents and deed.

The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent on the 16th February, 1847, and was in possession of the said lands, and in receipt of the rents and profits thereof until the time of his death, which happened on the 20th March, 1882.

In the year 1866 the statute 29 & 30 Vic. c. 16, entitled, "An Act to provide for the sale of Rectory Lands in this Province," was passed by the Parliament of Canada, which gave the Incorporated Synod of any Diocese of the United Church of England and Ireland in Canada, or the Church Society, with the consent of the Synod where the Synod was not incorporated, "full power and authority to sell and absolutely dispose of any lands granted by the Crown in such Diocese, as a glebe of, or as appurtenant or belonging to, or appropriated for, any rectory of the said Church in such Diocese, by whatever name the same may be called, or in whomsoever the title thereto may be vested."

In a suit brought by the incumbents of several rectories which were subsequently erected in the said city of Toronto, and the Synod of the Diocese of Toronto, to have the lands covered by the patent of 1820, and the deed of 1825 divided up under the provisions of that Act, it was

Held, (affirming the judgment of FERGUSON, J.) that the lands in question were covered by the terms

of the Act: that prior to the year 1866 there were Rectory Lands derived directly from the Clergy Reserves, and lands specially granted to trustees, which were treated as endowments for rectories, and that the Legislature intended to deal with both classes: that the delivery up and cancellation of the patent of 1817 being to correct an error, could not be held to be such a consideration as would make the patent of 1820 a grant for value: that Crown grants which were of a *quasi* public character were different from private gifts, and the Synod, in the case of the former, had petitioned for and obtained the power they desired: that 14 & 15 Vic. c. 175, s. 2, (C. S. C. c. 74,) afforded strong evidence that prior to the year 1866 there had been endowments for rectories out of the public domain, as well as out of the Clergy Reserves.

After the hearing and before the appeal was argued, a motion was made to strike the case out of the list, on the ground of maintenance, and it was shewn that the defendant, the Rev. J. P. D., did not wish to proceed with this suit; but that as he was pressed to do so by his Vestry and Churchwardens, he allowed his name to be used as appellant upon being indemnified by the latter as to costs.

Per BOYD, C.—There was maintenance in the suit though not in the criminal sense, and the case should be struck out.

Per PROUDFOOT, J.—There was no maintenance.

The decree of FERGUSON, J., was, however, varied by allowing the costs of all parties up to the hearing to come out of the fund. *Langtry v. Dumoulin*, 644.

Devisees to Charities—Mortmain—Failure of bequests — Incorporated Synods—Power to hold in Mortmain.] See WILL, 2.

CONSTITUTIONAL LAW.

A subscriber for stock in a company which was amalgamated with another company by Ontario Statute, 46 V. c. 58, before any stock was allotted to him, contended that he never agreed to become a shareholder in the amalgamated company.

Held, that the Statute answered this objection, and that being within the jurisdiction of the Local Legislature it could not be objected to as unjust. *Re Standard Fire Ins. Co. Kelly's Case*, 204.

Patent Act of 1872—Court, constitution of—Dominion Parliament—Ultra vires—Power of Minister—Prohibition.]—See PATENT OF INVENTION, 2.

See also SESSIONS.

CONTEMPT OF COURT.

By-law quashed, as having been passed in disregard and contempt of a County Court Judge's Order.]—See WAYS, 1.

CONTRACT.

1. *Statute of Frauds—Contract not to be performed within a year—Part performance — Rescission.]—*The plaintiff agreed to purchase from the defendant 76 shares of stock in the Globe Printing Company, and gave to the defendant his note, payable in two years, for the price of the

shares, which were transferred to him. At the defendant's request he then pledged these 76 shares, and, as the jury found, lent the defendant 44 other shares of his own, to pledge to a bank, which discounted the note for the defendant.

The jury also found that it was a condition of the purchase that the defendant, who had a large interest in the Globe Printing Co., should keep the plaintiff in the position which he occupied as managing director of the Globe Printing Co., at a fixed salary. The defendant at the maturity of the note retired it, and took an assignment to himself of the 120 shares.

The plaintiff having been afterwards dismissed from his position as managing director, brought this action for a return of the 44 shares, on the ground that the purpose for which they had been pledged, (viz.: the raising of money by the defendant for Hon. George Brown's estate) had been fulfilled: and for a return of the note, and to be relieved from the purchase of the 76 shares, on the ground that the condition of the purchase, (viz.: his being retained in office,) had not been fulfilled, but had been broken by the defendant's procuring his dismissal.

Held, that as there had been a partial performance of the defendant's agreement, by retaining the plaintiff in office for the period within which the 76 shares were to have been paid for, there could be no rescission of the whole contract; but that the plaintiff—the finding of the jury as to the 44 shares not having been moved against—was entitled to a return of these shares, and the defendant to judgment for the price of the 76 shares; and that the plaintiff's remedy, if any, for wrongful dismissal was by an independent action.

Held, also, that the defendant having performed his portion of the agreement, the Statute of Frauds, as regards agreements not to be performed within a year, was not applicable to the undertaking to keep the plaintiff in office. *Brown v. Nelson*, 90.

2. *Specific performance—Absence of common intention* — “Without prejudice.”—R. wrote to O.: “I have considered the matter of our conversation, and offer you \$800 for the property.” O. replied: “I have your favour offering \$800 for the property (describing it). I have concluded to accept your offer.” The evidence shewed that at the prior conversation referred to in R.’s letter, R. was seeking to buy the property in question on terms of five or seven years’ credit.

Held, that as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it.

A letter containing an offer written “without prejudice,” means “I make you an offer; if you do not accept it, this letter is not to be used against me.” But when the offer is accepted the privilege is removed. *Omnium Securities Co. v. Richardson*, 182.

3. *For sale of land—Authority to make—Agency—Variation in acceptance of terms of offer.*—See PRINCIPAL AND AGENT, 1.

4. *Breach by one covenantor of joint contract not to trade.*—See PARTNERSHIP, 1.

5. *By municipal corporation not*

under seal—Liability.—See CORPORATIONS, 5.

6. *Agreement—Promise to answer for the debt of another—Quantum meruit—Parties’ minds ad idem.*—See GUARANTEE AND INDEMNITY.

CONTRIBUTORIES.

In winding up proceedings.—See CORPORATIONS, 1, 4.

CONSPIRACY.

To bribe members of Parliament—Pleading.—See CRIMINAL LAW, 3.

CONVEYANCE.

Void for improvidence and want of professional advice—Terms of setting aside—Compensation for improvements under—Payment by grantee of mortgage debt on land conveyed—Occupation rent—Accounts.—See FRAUD AND MISREPRESENTATION.

CONVICTION.

Lottery Act—Prizes for guessing number of buttons in glass jar—Quashing conviction—Costs.—See GAMING.

Under 32-33 Vic. ch. 28—Fine and costs.—See JUSTICES OF THE PEACE, 1.

Fraudulent removal of goods—11 Geo. II. ch. 19, sec. 4—Defendant compelled to testify.—See JUSTICES OF THE PEACE, 3.

Temporary judicial district of Nipissing—Appeal to Quarter Sessions of Renfrew—Grouping Clauses Act—R. S. O. ch. 42.]—See SESSIONS.

Liquor License Act—Conviction by two magistrates—Onus of proving license—Imprisonment in default of distress—Selling liquor to Indian.]—See TAVERNS AND SHOPS.

COMPUTATION OF TIME.

Charter—Demurrage—Computation of time—Sunday.]—See SHIPPING.

CORPORATIONS.

1. *Subscriber to stockbook—Allotment of shares—Winding up—Contributories—Constitutional law.]—K. signed a stock-book headed as follows: "We, the undersigned, do hereby subscribe for shares of the capital stock of the Alliance Insurance Company, and agree to take the number of shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company 10 per cent. of the amount of stock subscribed by us respectively within thirty days from the day of our several subscriptions." The Act incorporating the Alliance Company, vested the shares of the company in the persons who should subscribe for the same. Before any stock was actually allotted to K., the Alliance Company was amalgamated by 46 Vic. c. 58, O., with the Standard Insurance Company, which company was ordered to be wound up.*

Held, that K. was rightly made a contributory.

Nasmith v. Manning, 5 S. C. 417, distinguished.

It was contended that K. never agreed to become a shareholder in the Standard Insurance Company, but

Held, that the statute answered this objection, and that being within the jurisdiction of the Local Legislatures, it could not be objected to as unjust. *Re Standard Fire Ins. Co.—Kelly's Case*, 204.

2. *Trespass to person—Lodge of Oddfellows—Initiation of member—Liability of corporation for acts of members.]—The plaintiff, during his initiation as a member of the defendant's lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked.*

Held, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kinver v. The Phoenix Lodge, I. O. O. F.*, 377.

3. *Action for unpaid shares—Foreign company—40 Vic. ch. 43, sec. 47 (D)—Non-issue of execution in Ontario—Pleading.]—In an action by a creditor of the Morton Dairy Company, (limited), against defendants, to recover the amount of unpaid shares in that company, under 40 Vic. ch. 43, sec. 47, (D), the head office of the company being in Quebec, where the plaintiff's judgment against the company had been obtained and execution returned thereon unsatis-*

fied, a demurrer to the statement of claim was allowed, because it did not appear that an execution in Ontario against the company had been returned unsatisfied. *Brice v. Munro*, 435.

4. *Winding up proceedings—Contributories.*]—Appeal from Master's report, which placed certain parties on the list of stockholders as contributories to the extent of their unpaid stock.

CHISHOLM'S CASE. — C. having been communicated with by the president of the company agreed to act as a director, and gave his note for \$500, in order to obtain a qualification. The president subscribed for 50 shares stock for him, on which the \$500 would pay ten per cent. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on 50 shares, and he at once communicated with the president, who told him not to mind, and that the secretary would be instructed, and he was not troubled again about it. At this time his note had been carried by the company, and he had paid nothing. The president then absconded, and he was notified of a five per cent. call, and gave a note for \$250 in payment of same, not (as he alleged) because he was liable, but because he was told that would settle his total liability, and he did not wish to enter into a suit.

Held, that he was properly placed on the list of contributories.

TURNER'S CASE. — T. signed a power of attorney to C. to subscribe for 20 shares of stock, and delivered it to him *on the understanding that*

it was not to be used except he became a director of the company. C. directed the accountant to enter T.'s name in the stock ledger as a stockholder, which was done. Blotting pads were issued, and an advertisement published in a newspaper, and a return made to the government, with T.'s name inserted as a director in the two former, and as a member in the latter; but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement, or returns, and that he did not know his name was in any of them; and on receipt of a notice claiming a five per cent. call, he at once repudiated all liability.

Held, that the stipulation that he was to be a director was a condition precedent to his becoming liable as a shareholder, and that T.'s name must be removed from the list of contributories.

BARBER'S CASE. — B. signed a power of attorney to subscribe for stock under the same circumstances as Turner, but was asked by letter to fix the time to suit himself to pay the ten per cent. call, and he added to the power a clause that "the ten per cent. was to be payable in one year from date." He was also notified by the secretary of the company that he was a shareholder, and a notice of a meeting was sent to him. There was no evidence to shew that he made the formation of the board a condition precedent to his becoming a shareholder.

Held, that the entry by the accountant of B.'s name as a stockholder was equivalent to an entry by C., to whom the power was given, and was no delegation of any discretionary power, but a mere ministerial act.

Held, also, following *National In.*

Insurance Co. v. Eagleson, 29 Gr. 406, reported to that it was not material that the name was not entered in the subscription book, nor that there was no specific allotment of stock; and that B. was properly placed on the list.

COPP, CLARK & Co.'s CASE—This case was somewhat similar to Barber's case, but there was an understanding that the calls were to be paid in work, and \$100 worth of work was so done and credited in the books of the company; and C., C. & Co. printed the pads, saw the advertisement in the paper, and received notices of the calls.

Held, that they were contributories.

CASTON'S CASE.—C. signed the power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock, but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years; and he was appointed solicitor under the seal of the company, received notices of meetings and calls, and did not expressly repudiate his liability.

Held, that he was properly made a contributory. *Re Standard Fire Ins. Co.*, 448.

5. *Municipal corporation—Contract not under seal—Liability.*—The financial affairs of a municipal corporation being in disorder a commissioner was appointed by the Government to investigate them, and the plaintiffs, professional accountants, were employed by the council to examine and arrange the accounts. Resolutions were passed, not under seal, recognizing that the work was being done by the plaintiffs, who

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High Court of Justice.—See CRIMINAL LAW, 1.

Of the Minister of Agriculture.—See PATENTS OF INVENTION, 2.

County Court.—See SESSIONS.

COVENANT.

Breach by one covenantor of joint contract not to trade.—See PARTNERSHIP, 1.

CRIMINAL LAW.

1. *Ontario Judicature Act—Constitution of Courts—Criminal proceedings—Removal of indictment by certiorari—Practice.*—An indictment was found against the defendants in the High Court of Justice at its sittings of Oyer and Terminer and Gaol Delivery, and on being called upon to plead the defendants demurred to the indictment. A writ of *certiorari* was subsequently obtained by the defendants, in obedience to which the indictment, demurrer, and joinder were removed to the Queen's Bench Division. Upon the return the Crown took out a side-bar rule for a *concilium*, and the demurrer was set down for argument. A motion was made by the defendants to set aside the proceedings of the Crown on the ground that they should have been called upon to appear and plead *de novo* in this Division.

Held, WILSON, C.J., dissenting, that the Court of Assize of Oyer and Terminer and General Gaol Delivery is now, by virtue of the Judicature Act, the High Court of Justice: that the indictment was found, and the defendants appeared and demurred

thereto in the High Court of Justice; and that it was not necessary to plead *de novo* to the indictment.

Per ARMOUR, J., and O'CONNOR, J. The Supreme Court of Judicature is not properly a Court, and ought more properly to have been called the Supreme Council of Judicature. The Divisions of the High Court are not themselves Courts, but together constitute the High Court, which is thus divided for the convenience of transacting business; and the Judges sit as Judges of the High Court, and exercise the jurisdiction and administer the jurisdiction of the High Court.

The recognizance entered into by the defendants, on the removal of the proceedings to this Division, provided that they should "appear in this Court and answer and comply with any judgment which may be given upon or in reference to a certain indictment, &c., or upon or in reference to the demurrer to such indictment, and plead to said indictment if so required."

Per WILSON, C.J. *Semhle*, that the practice and procedure before the Judicature Act should be maintained in its entirety; though possibly it might be varied by agreement. By the recognizance the defendants had not agreed to vary it, but they might thereunder elect to appear and answer to the indictment, or to appear and argue the demurrer; and they, being ready to appear and answer the indictment, would fully perform the condition of the recognizance by so doing. *Regina v. Bunting et al.*, 118.

2. *Forgery—Alteration of Dominion note—31 Vic. ch. 46 (D.)—32-33 Vic. ch. 19, sec. 10. (D.)*—*Held*, that the alteration of a \$2 Dominion note to one of the denomi-

nation of \$20, such alteration consisting in the addition of a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted therefor. *Regina v. Bail*, 228.

3. *Conspiracy to bribe members of Parliament—Pleading.*]—On demurrer to an indictment (set out below) for conspiracy to bring about a change in the Government of the Province of Ontario, by bribing members of the Legislature to vote against the Government,

Held, O'CONNOR, J., dissenting:

1. That an indictable offence was disclosed: that a conspiracy to bribe members of Parliament is a misdemeanour at common law, and as such indictable.

2. That the jurisdiction given to the Legislature by R. S. O. ch. 12, secs. 45, 46, 47, 48, to punish as for a contempt, does not oust the jurisdiction of the Courts where the offence is of a criminal character, but that the same Act may be in one aspect a contempt of the Legislature, and in another aspect a misdemeanour.

3. That the Legislative Assembly has no criminal jurisdiction, and hence no jurisdiction over the matter considered as a criminal offence.

4. That the indictment, considered as a pleading, sufficiently stated the offence intended to be charged.

Per O'CONNOR, J.—1. That the bribery of a member of Parliament, in a matter concerning Parliament or Parliamentary business, is not an indictable offence at common law, and has not been made so by any statute. 2. That in all matters and offences done in contravention of the law and constitution of Parliament, with the exception of treason, felony,

and breaches of the peace, Parliament alone has jurisdiction, and ordinary Courts, civil and criminal, have no jurisdiction. 3. That *lex et consuetudo Parliamenti* serves to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its dignity, or concerning its powers, members, and its business, with above three exceptions. *Regina v. Christopher Bunting, John A. Kinison, Edward Meek, and F. S. Kirkland*, 524.

4. *Lottery Act—Prizes for guessing number of buttons in glass jar—Quashing conviction—Costs.*]—
GAMING.

Conviction under 32-33 Vic. c. 28—Fine and costs.]—*See* JUSTICE OF THE PEACE, 1.

DEBENTURES.

Railways—Debentures—Issued in blank—Subsequent insertion of holder's name—Estoppel.—"Negotiable."—38 Vic., c. 47, (O).]—The C. M. Railway company being authorized by 38 Vic. c. 47, O. to issue preferential debentures, the holder of which, it was enacted, might, in case of default in payment, obtain a foreclosure or sale of the railway by suit in Chancery, the directors passed a resolution enacting that such debentures should be issued, under the seal of the company, and should "be negotiable from time to time as the directors shall see fit, and the proceeds thereof shall be required for the purposes of the company by the managing director."

Debentures were accordingly issued in blank, and handed to the managing director, who, subsequently, the railway being indebted to the

tiff, delivered certain of them to the latter, as security for such debt.

The debentures were in the following form :

Debenture.	No.
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The C. P. & M. Railway Company owes the Bank of Toronto, or order, the sum of \$1,000 payable in ten years * * with interest at 8 per cent per annum, payable half-yearly, on presentation of the proper coupons hereto attached.

The name, Bank of Toronto, was not filled in until about the time of delivery to the plaintiffs, who now brought this action for an account of what was due under the debentures and payment, or in default, a sale by the Court of the property of the company.

Held, that the debentures were valid, and judgment must go as asked.

The strict rules of the common law relating to deeds are not applicable to such debentures, but rather the rules of the law merchant relating to negotiable securities. But if this were not so, the fact that the name, Bank of Toronto, was not filled in until delivery to the plaintiffs did not make the debentures void ; it would come within that class of cases where deeds have been held good, notwithstanding an alteration or subsequent addition, because, at the time of execution, there was something which could not be ascertained and was therefore to be filled up afterwards. Here, however, there was no execution, which imports delivery, prior to the time when the name was filled in.

Held, also, that though the debentures were under seal, this did not detract from their character, which was rather that of promissory notes than of mortgages ; and though the Act made them a charge on all the

property of the company, with a right of foreclosure and sale, this was something superinduced upon the security by virtue of the statute.

Held, further, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and the company would be estopped from relying on such defences as the above.

Held, lastly, that inasmuch as it appeared that these debentures were delivered with a view to facilitate the company's operations in getting out and disposing of ore, the main branch of its business, this was a "negotiation" of them "for the purposes of carrying on the company's business and so within the meaning of the aforesaid Act and by-law. *Bank of Toronto v. Cobourg, Peterborough, and Mar-mora Railway Company et al.*, 1.

DEMURRAGE.

Computation of Time—Sunday.]—
See SHIPPING.

DEMURRER.

*To an indictment.]—*See CRIMINAL LAW, 3.

*Right of administrator appointed in Ontario to sue for moneys payable in Quebec.]—*See EXECUTORS AND ADMINISTRATORS, 1.

DESCRIPTION OF GOODS.

See **BILLS OF SALE AND CHATTEL MORTGAGES.**

DOWER.

1. *Will—Election.*]— A testator, after bequeathing certain legacies, devised his lands to his sons, charging them, however, with the legacies and also with an annuity of \$100 to his widow, to whom he also bequeathed his furniture, apartments in his dwelling house, and sundry other things. The estate was sufficient to answer all legacies, and also the widow's dower.

Held, that the widow was not put to her election as between the will and her dower. *Wilson v. Wilson*, 177.

2. *Will — Election — Express provision in will — Evidence.*] — Where a will in express terms makes provision for the testator's wife in lieu of dower, thus bringing directly to her mind that she cannot have dower and the benefits of the will as well, much less dealing with the property left to her, will evidence an election on her part to take under the will, than would be sufficient in the absence of such express provision.

Held, in this case, that, there being such provision, the evidence set below was sufficient to establish an election to take under the will, though otherwise it would not have been. *Nixon v. Ashenhurst*, 664.

DRAINS.

Drainage by-law—Use of sewer without leave—Validity of by-law.]— See **WATERS AND WATERCOURSES**, 1.

EASEMENTS.

Water lots — Enjoyment as of right.] — See **WATERS AND WATERCOURSES**, 2.

ELECTION.

As to dower.]—See **DOWER**, 1, 2—**PARLIAMENT.**

ESTOPPEL

Assignment for creditors—Assent of creditors—Estoppel.]—See **BANKRUPTCY AND INSOLVENCY**, 3.

Railways—Debentures — Issue in blank—Subsequent insertion of payee's name—Estoppel—Negotiating—38 Vic. c. 47, O.]—See **DEBENTURES**, 1.

See **ARBITRATION AND AWARD**, 1.

EVIDENCE.

1. A letter containing an offer written "without prejudice," means "I make you an offer; if you do not accept it, this letter is not to be used against me." But when the offer is accepted, the privilege is removed. *Omnium Securities Co. v. Richardson*, 182.

2. A copy of an order, and of a writ of execution issued pursuant thereto, admitted in evidence, an official in the office when the same had been filed, testifying that he had made the copies from the originals, which now proved to have been lost. A memorandum or entry in a book in the office of a sheriff, in the handwriting of the deputy sheriff, purporting to be an entry of the receipt

of a certain writ by the sheriff, admitted in evidence, subject to objection, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting and the place from which the book was produced. *Wardrope v. The Canadian Pacific R. W. Co., et al.*, 321.

Journals of Parliament—Proof of status as rector.]—See CHURCHES, 3.

Of election of dower.]—See DOWER, 2.

As to amount when parties swear differently, and other evidence contradictory.]—See GUARANTEE AND INDEMNITY.

Interpleader—Goods claimed by wife—Separate business—R.S.O. ch. 125, s. 7.]—See HUSBAND AND WIFE, 2.

Defendant compelled to testify.]—See JUSTICES OF THE PEACE, 3.

Provincial election — Returning officer—Refusal to delay return after notice of recount—Evidence of.]—See PARLIAMENT.

Onus of proof — Production of documents.]—See PRINCIPAL AND SURETY.

EXECUTION.

1. *Execution—Fi. fa. lands—Sale by sheriff before return nulla bona—R.S.O. ch. 66, sec. 15.*]—Held, under the circumstance of this case, that a sale under a *fi. fa.* against lands conferred a good title on the purchaser, although the *fi. fa.* against goods had not been returned *nulla bona* under R. S. O. ch. 66, sec. 15.

It appeared that the sheriff would have returned the writ *nulla bona* if called upon to do so; that the judgment debtor had no goods in the county during the currency of the writ against goods, and that the plaintiff endeavouring to set aside the sale, being a mortgagee, would, if he had made the proper searches, have found the writ against lands in the sheriff's hands. *Ross v. Malone, et al.*, 215.

2. *Sale of lands by sheriff before return of fi. fa. goods—Irregularity—43 Geo. III. c. 1—R. S. O. c. 66.*]—Held, (affirming the judgment of FERGUSON, J., ante p. 215) following *Doe d. Spafford v. Brown*, 3 O. S. 95, and *Ontario Bank v. Kirby*, 16 C. P. 35, decided under 43 Geo. III. c. 1, that the issue of an execution against lands before the return of an execution against goods is, under R. S. O. c. 66, an irregularity only, and not a void proceeding, the provision of both statutes being in effect the same. *Ross v. Malone et al.*, 397.

Garnishee proceedings — Debtor and creditor—Attaching plaintiff not a "creditor" of garnishee—Evidence of official documents.]—See ATTACHMENT OF DEBTS.

Action for unpaid shares—Foreign company—Non issue of execution in Ontario—Pleading.]—See CORPORATIONS, 3.

Proof of.]—See EVIDENCE, 2.

EXECUTORS AND ADMINISTRATORS.

1. *Private international law—Administrator—Right to sue for moneys payable in foreign state.*]—To an

action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by the terms thereof, was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there: that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys.

Held, on demurrer, a good defence. *Pritchard v. Standard Life Assurance Co.*, 188.

2. *Liability of executors for estate moneys received by Solicitor—Inactive trustee—Negligence.*—A., B., and C., the three executors under a will, sold certain real estate of the testator. C. who was entitled to the annual income of the proceeds thereof, took the most active part in the management of the estate, as the others lived at a distance, and employed a solicitor who received two sums \$980 and \$1580, part of the proceeds of said sale, the former in January, 1876, and the latter in February, 1882. Both the other executors were aware of his employment and that these sums were in his hands. In February, 1884, the solicitor absconded causing a loss to the estate of \$1960, the balance then in his hands. In the will there was a clause "that each (of the executors) should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default."

Held, that all three were equally liable and must make good the amount to the estate, the rule being when one or more of several trustees

act in getting in and dealing with the trust funds, an inactive trustee is accountable therefor equally with the others, if, having the means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on. *McCarter et al. v. McCarter et al.*, 243.

FIXTURES.

Property in chattels affixed not to pass—Intention—Injunction.—T. being liquidator of a company which was being wound up sold the manufactory to H. for \$9000, part in cash and the balance secured by a mortgage on the premises. At the time of the sale there was an engine, boiler, pulleys, &c., among the machinery on the premises, but no mention of them was made in the mortgage. H. afterwards undertook to sell the engine, boiler, and pulleys, but T. objected until assured that they would be replaced by better machinery. H. purchased from I. and H., the defendants, another engine, boiler, shafting, hangers, and pulleys to replace the old ones, paying part in cash, and securing the balance by notes, under a written agreement, which stipulated that the property should not pass to H., but was to remain in I. and H. until the full payment of the price, and of any obligations given therefor, but H. was to have possession at once, and to use the same until default in payment * * when I. and H. might resume possession. The engine and boiler were placed upon a stone foundation and bricked over in a building on the premises other than that from which the old ones had been removed. They could be re-

moved by taking down a part of the wall of the building in which they were placed, and without injury to the old building ; but were so affixed to the realty as under ordinary circumstances to become a part of it. H. failed, assigned his estate for the benefit of his creditors, and made default in payment, and I. and H. began to remove the machinery.

In an action brought by T. for an injunction restraining the defendants I. and H. from such removal.

Held, that the express agreement between H. and the defendants, that the property in the machinery should not pass from the defendants to H. until paid for, and the intention with which the articles were affixed must govern : and that the machinery therefore did not become part of the realty or pass to the plaintiffs. *Thomas v. Inglis et al.* 588.

FOREIGN LAW.

Right of administrator appointed in Ontario to sue for moneys payable in Quebec.—See EXECUTORS AND ADMINISTRATORS, 1.

FORGERY.

Alteration of Dominion note.—See CRIMINAL LAW, 2.

FRAUD AND MISREPRESENTATION.

Conveyance void for improvidence and want of professional advice—Terms of setting aside—Compensation for improvements under—Payment by grantee of mortgage debt on land conveyed—Occupation rent—Accounts.—On August 30th, 1875,

the plaintiff, an illiterate man, over 75 years old, voluntarily conveyed his farm to the defendants, his sons. On the same day the defendants leased the farm to the plaintiff for the term of his natural life, reserving no rent. On September 23rd, 1875, the plaintiff leased to D., one of the defendants, but for the benefit of both, the said farm for the term of his, the plaintiff's, life, reserving a rent of \$100 a year, and "the proper board, clothing, and lodging" of the plaintiff "so long as he remains on the premises," and by the same deed transferred to D. all the goods and chattels on the farm. The defendants, thereupon, went into possession of the farm, on which the plaintiff also continued to reside, and before action brought had built a house on it, and made sundry improvements.

Held, that upon the evidence set out in the case, the grant of August 30th, 1875, and the lease of September 23rd, 1875, must be set aside on grounds of improvidence, and want of proper professional advice.

Held, however, that though it appeared that the defendants had made serious default in regard to the lease of September 23rd, 1875, and had been guilty of violence and ill-treatment towards the plaintiff, yet the above relief could only be granted upon the terms of the defendants being repaid, all sums expended in improvements, and repairs of a permanent and substantial nature, by which the present value of the farm was enhanced, with interest from the time these sums were actually disbursed ; also the moneys paid by them to keep down the interest of a certain mortgage, which had existed on the farm ever since its original purchase by the plaintiff, and any principal moneys thereof paid by

them ; also of the defendant D. being repaid rents paid to the plaintiff, and the value of such maintenance as he had given to the plaintiff ; but that, on the other hand, the defendants must be charged with deterioration, to be set off against improvements, and with rents and profits of all kinds received by them, and with an occupation rent, and also with the value of the chattels mentioned in the lease, and given up to them by the plaintiff. *Shanagan v. Shanagan*, 209.

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FRAUDS, STATUTE OF.

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GAMING.

*Lottery Act—Giving prizes for
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liable, and not being in writing, could not be enforced.

Held, also, that, on the evidence as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory, the fair inference was that the parties' minds were never *ad idem*, and the recovery could only be on the *quantum meruit*. *Hoener v. Merner et al.*, 629.

HABEAS CORPUS.

Discharge under habeas corpus was not a quashing of his conviction.]
--See INDIAN.

HIGHWAYS.

Subway, Construction of—Adjoining municipalities — Municipality performing work outside its limits—Ultra vires—Liability as wrongdoer.]
--See RAILWAYS AND RAILWAY COMPANIES, 1.

HUSBAND AND WIFE.

1. *Liability of wife for husband's contract—Potential equity.*]-
Plaintiff agreed with J. R. to build a house on certain land for \$850. After building the house he discovered that the land belonged not to J. R. but to J. R.'s wife, who, at the time of the agreement, was an infant, and was in no way a party to it. Afterwards J. R. and his wife sold and conveyed the land and house to M., an innocent purchaser. The plaintiff was only paid a portion of the \$850, and now brought this action to recover the balance from the wife of J. R.,

or the amount by which the building had enhanced the value of the land.

Held, that inasmuch as there was no property or fund transferred or settled upon the wife that would have been liable to seizure by a creditor, the plaintiff could not recover against her. *Kincaid v. Reid et al.*, 12.

2. *Interpleader—Goods claimed by wife—Separate business—R. S. O. c. 125, s. 7—Verdict for claimant set aside and judgment given for defendant—Rule 321.*]- In an interpleader issue to try the right to certain goods seized under an execution against A. and claimed by B., his wife. it appeared that since their marriage a store business had been carried on in the name of the wife, and that frequent trades and transactions in real estate had also taken place in her name, but that in most of them the husband was the bargainer, and it was only when the bargains had to be carried out that the wife appeared in them: that the husband kept the store books, which she said she did not know much about, as she was no scholar: that the husband made nearly all the purchases of stock, and sold goods, and spoke and acted as if he were the owner: that he was not in receipt of wages, but took what money he wanted out of the store when he pleased, and in the transaction out of which the judgment and execution arose under which the stock was seized, he opened the negotiation by a letter signed by himself, referring to the property he offered in trade as *his* property, and when the bargain was closed took a deed of the store in his own name, and gave back a mortgage and his own note for the balance due. The jury, in the face of the Judge's charge in

favour of the execution creditor, found that the stock was the property of the wife, that she did not act fraudulently, and that she carried on business separate from her husband.

Upon a motion to the Chancery Divisional Court to set aside the verdict and to enter a verdict for the defendant or for a nonsuit, or for a new trial, on the ground that the verdict was contrary to the evidence and to the direction of the Judge, and perverse, and that it was against the weight of the evidence, it was

Held, that the business was not one protected by R. S. O. ch. 125, sec. 7; that the verdict could not be sustained; and under Rule 321, O. J. A. and R. S. O. ch. 50, sec. 383, it was set aside and judgment entered for the defendant.

Murray v. McCollum, 8 A. R. 277, referred to and distinguished. *Campbell v. Cole*, 127.

3. *Moneys advanced by wife to husband* — *Contract for repayment*.]—A woman, married to her husband in 1880 without marriage settlement, afterwards advanced certain moneys to him, which she now sought to recover as money lent. She failed, however, to prove a contract for repayment.

Held, that she could not recover. *Hopkins v. Hopkins*, 224.

4. *Action for alimony* — *Desertion* — *Offer to return* — *Pleading* — *Costs*.]—R. S. O. ch. 40, sec. 48.]—In an alimony action the defendant in his defence alleged that he had refused, and still refused, to support the plaintiff by reason of her having committed adultery with M. At the trial it appeared that the plaintiff, on being charged by the defendant with adultery, and ordered to go away, left his house, though, before she

actually departed, he forbade her to go. The defendant persisted in the charge of adultery, but did not attempt to prove it. The plaintiff proved none of the acts of violence alleged in her statement of claim.

Held, that the statements in the defence, taken in connection with the above facts, must be treated as sufficient proof of desertion on his part, and he must be taken to have dispensed with the necessity for the plaintiff offering to return.

The defendant having, at the trial, after the plaintiff's evidence had been given, for the first time offered to take her back to his house.

Held, that the judgment for alimony should stand over for six weeks to see if this offer was carried out, and that the plaintiff was, in any event, entitled to her full costs of suit. *Ferris v. Ferris*, 496.

IMPROVEMENTS.

Compensation for.]—See FRAUD AND MISREPRESENTATION.

INDIANS.

Indian lands — *Trespass* — *Indian superintendent* — *Jurisdiction* — *Conviction* — *Discharge on habeas corpus* — *Action for malicious prosecution*.]—*Held*, that the defendant, who was a Visiting Superintendent and Commissioner of Indian affairs for the Brant and Haldimand Reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in the County of Brant.

Held, also, that the discharge of

the plaintiff from custody on *habeas corpus* was not a quashing of his conviction on the above charge ; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been so ; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause. *Hunter v. Gilkison*, 735.

Selling liquor to.]—See TAVERNS AND SHOPS.

INDIAN LANDS.

See INDIANS.

INDICTMENT.

Removal of by certiorari.]—See CRIMINAL LAW, 1.

Demurrer to.]—See CRIMINAL LAW, 3.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

1. *Fire Insurance—Damage by removal of goods—Salvages.*]—The plaintiff's stock-in-trade was insured against loss by fire in the defendant company, a fire occurred in an adjoining building, and the plaintiff's warehouse being in danger of destruction, he

removed his stock which was thereby damaged, and some of it lost.

Held, that there was a loss covered by the policy, and no salvage to which the defendants were liable to contribute under the fifth statutory condition, which declared that in case of removal of the property to escape conflagration the company will rateably contribute to the loss and expenses attending such act of salvage. *McLaren v. The Commercial Union Assurance Co.*, 64.

2. *Marine insurance—Condition precedent—Adjustment—Double insurance — Contribution.*]—Where, by a certificate of marine insurance, effected in this province on cattle, representing and taking the place of a policy, it was provided, as the condition of payment, that all claims should be reported to the M. Insurance Company of Liverpool, as soon as the goods were landed or the loss known, to be adjusted according to usages there, and the special condition of the contract of insurance.

Held, that the adjustment by the M. Insurance Company was not a condition precedent to the plaintiffs' right to recover. All that was required to be done by the insured was duly to report to that company the claim to be adjusted.

Defendants, by such certificate, insured for the consignor cattle from Boston to London, England, against all risks, except to be free of particular average, unless the vessel be stranded, sunk, or burned, or in collision. The cattle were consigned to F., and consignor drew £1,740 upon F., who accepted the bill and insured the cattle in England for £5,000, 75 per cent., against all risks, and 25 per cent. mortality was not insured against. It was sworn that F. had been told by the consignor to

insure in all cases where they had made advances. After the loss F. received £1,500 on account of the English policies, but hearing that an insurance had been effected in Canada, and assuming that it would have the anti-contribution clause, so that the first insurance alone would be liable, they returned the money pursuant to an undertaking which they had given, but the policies were not cancelled.

Held, that there was a double insurance, for the risk, the interest and the subject were the same, and the difference between the several policies as to the extent of liability did not vary the risk.

Held, also, that the defendants were liable to the plaintiffs for the whole amount insured, leaving them to recover contribution from the other insurers, according to the rule in force in England and here; but that they were entitled to deduct the £1,500 paid, and that this sum having been repaid under a mistake of fact and without prejudice, the plaintiffs might have recourse to the underwriters for it. *The Bank of British North America v. The Western Assurance Co.*, 166.

3. *Explosion by gunpowder—Liability—Statutory conditions.*—In an action on a fire insurance policy subject to the statutory conditions, it appeared that an accidental explosion of gunpowder had taken place, which did considerable damage, a portion of the damage being caused by the explosion itself, and a portion by the fire consequent on the explosion.

Held, CAMERON, C. J., dissenting, that under statutory conditions Nos. 10 and 11, the company were liable only for the loss occasioned by the fire, but not for that caused by the

explosion. *Hobbs et al. v. The Guardian Fire Ins. Co.*, 634.

Reference to arbitration—Costs of arbitration and award.—See ARBITRATION AND AWARD, 2.

Taxation of premiums of foreign insurance company.—See ASSESSMENT AND TAXES, 2.

INTEREST.

When interest begins to run against purchaser.—See SALE OF LANDS 1.

JUDGMENT.

Interpleader—Goods claimed by wife—Separate business—R. S. O. c. 125, s. 7—Verdict for claimant set aside and judgment given for defendant—Rule 321.—See HUSBAND AND WIFE, 2.

JUDICATURE ACT.

The Court of Assize of Oyer and Terminer and General Gaol Delivery is now, by virtue of the O. J. A., the High Court of Justice.—See CRIMINAL LAW, 1.

See HUSBAND AND WIFE, 2.

JURY.

Separation of, after Judge's charge—Consent of counsel.—See VERDICT

JUSTICES OF THE PEACE

1. *Conviction under 32-33 Vic. ch. 28—Fine and costs.*—A conviction under 32-33 Vic. ch. 28, for

keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment.

Held, good. Regina v. Walker, 186.

2. *Action against justice of peace*—*Notice of action and statement of claim—Defect in—Failure of action.*]

—In an action against a justice of the peace and constable for having issued a search warrant against the plaintiff, for having and concealing a colt belonging to another.

Held, that the notice of action and statement of claim, being each of them founded upon a cause of action arising in a case in which the justice had jurisdiction, were defective for want of the allegation that the justice acted "maliciously, and without reasonable and probable cause;" and that the statement of claim was defective in not shewing a right to restitution of the property, although the plaintiff was acquitted of any wrongful taking, detention, or concealment of the same.

Held, also, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, the statement of claim not alleging that the property had not been stolen. *Howell v. Armour et al., 363.*

3. *Fraudulent removal of goods*—11 Geo. II. ch. 19, sec. 4—*Defendant compelled to testify.*]

—The fraudulent removal of goods, under 11 Geo. II. ch. 19, sec. 4, is a crime, and a conviction therefor was consequently quashed, with costs against the landlord, because the defendant had been

compelled to give evidence on the prosecution. *Regina v. Lackie, 431.*

Power of Superintendent and Commissioner of Indian affairs to act as.]

—See INDIANS.

LANDLORD AND TENANT.

Indenture—Construction — Lease or License.]

—In an instrument by indenture, under the Short Forms of Leases Act, the plaintiff was described as lessor, and P. and H. lessees, the granting part being that the lessor did "give, grant, demise, and lease * * the exclusive right, liberty, and privilege of entering at all times for * * in and upon that certain tract of land situated * * reserving that portion thereof occupied, or hereafter to be occupied as roadway by a railway company named * * and with agents to search for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises," &c. The lessees were to have the right to use such timber found on the premises as might be required to carry on their operations, and such use of the surface as might be necessary for all the purposes appertaining thereto; also to pay taxes and to do statute labour assessed upon the premises; and they were not to allow any manufacture or traffic in intoxicating drinks upon said premises, or to carry on any business that might be deemed a nuisance thereupon; and there was a proviso that on the termination of the lease the lessor should have quiet possession, a proviso for re-entry in case of forfeiture, and a covenant by the lessor for quiet enjoyment.

Held, reversing the judgment of

Patterson, J. A., a lease, and not a mere license. *Seymour v. Lynch*, 471.

Fraudulent removal of goods.]—See JUSTICES OF THE PEACE, 3.

LANE.

Sale according to plan.]—See SALE OF LANDS, 2.

LEASE.

Construction of—Lease or License.]—See LANDLORD AND TENANT.

LEGACY.

Legacy charged on land—Receipt Legatee not bound to execute release—Costs.]—J. B., being the owner of certain land, by his will, gave his son, M. B., a legacy of \$150 and charged it on the land, which he devised to his son W. B., an infant: with a provision that his son J. B. should occupy it during the minority of W. B., and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained \$150 of the purchase money because the legacy was not released; but by an agreement agreed to pay T. B. the \$150 as soon as he should furnish a release duly executed by M. B. The right to receive the \$150 under this agreement and any right he had to obtain this release was assigned by T. B. to M. K. M. K. having tendered a release for execution to T. B., who declined to execute it, brought a suit to compel him so to do.

Held, that although the plaintiff

was entitled to a judgment declaring that the legacy was paid, which might be registered, still as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compellable to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do.

The purchaser should not have objected to the title on account of the legacy if there was proof of its being paid. *Kaiser v. Boynton*, 143.

LICENSE.

To clergyman—Revocation of, by Bishop without trial.]—See CHURCHES, 2.

License or lease.]—See LANDLORD AND TENANT.

LIQUOR LICENSE.

See TAVERNS AND SHOPS.

LOTTERY.

See GAMING.

MACHINERY.

Fixtures—Property in chattels affixed not to pass—Intention—Injunction.]—See FIXTURES.

MAINTENANCE AND CHAMPERTY.

See CHURCHES, 4.

MASTER AND SERVANT.

See CONTRACT, 1—PRINCIPAL AND SURETY.

MORTGAGE.

Custody of—Authority to receive mortgage money—Agency—Adoption of payments.]—Held, that custody of a mortgage gives no right to the custodian whether he be the solicitor of the mortgagee or not, to receive any part of the principal or interest secured. A mortgage not only secures money, but it affects the land, and so for its effectual discharge not only payment but re-conveyance is essential, and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security.

G., a mortgagee, left her mortgage in the office of M. her solicitor. F., the mortgagor, paid the interest and \$3,000 on account of principal to M., who paid over the interest, but retained the \$3,000, of which the mortgagee knew nothing. F. subsequently paid a further sum of \$1,500 on account of principal, and other sums of interest, all of which were paid over to G.

Held, that there was no implied authority, to receive the principal, and that the adoption of a later payment of principal could not of itself be held to ratify the prior unknown payment. *Gillen v. The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada et al.*, 146.

MORTMAIN.

Devises to charities — Mortmain — Failure of bequests—Incorporated

Synods—Power to hold in Mortmain.]—See WILL, 2.

MUNICIPAL CORPORATIONS.

1. *Liability under contract not under seal.]—See CORPORATIONS, 5.*

2. *Adjoining municipalities — Municipality performing work outside of its limits—Ultra vires—Liability as wrongdoer.]—See RAILWAYS AND RAILWAY COMPANIES, 1.*

3. *Drainage by-law—Use of sewer without leave—Validity of by-law.]—See WATERS AND WATERCOURSES, 1.*

4. *Order amending plan by closing street—R. S. O. c. 111, s. 84—By-law declaring street open—Municipal Institutions Act, R. S. O. c. 174, s. 506 — Quashing by-law.] — See WAYS, 1.*

5. *Badly constructed sidewalk—Ice on sidewalk—Negligence.]—See WAYS, 2.*

NEGLIGENCE.

1. *Of an inactive trustee.]—See EXECUTORS AND ADMINISTRATORS, 2.*

2. *Of municipal corporation in construction of sidewalk.] — See WAYS, 2.*

3. *Of obligees in a bond guaranteeing the good conduct of a bank cashier.] — See PRINCIPAL AND SURETY.*

NEW TRIAL.

Verdict set aside and N. T. granted by Chancery Division of H. C. of J.

under R. 321 O. J. A., and R. S. O. c. 50, s. 383.]—See HUSBAND AND WIFE, 2.

NOTICE OF ACTION.

Defect in, as against a Justice of the Peace.]—See JUSTICES OF THE PEACE, 2.

ODD-FELLOWS.

Liability of corporation for the acts of members in initiation ceremonies.]—See CORPORATIONS, 2.

PARLIAMENT.

Provincial election—Returning officer—Refusal to delay return after notice of recount—Evidence of—"Person aggrieved"—Jurisdiction to make order—R. S. O. ch. 10, secs. 125, 181.]—Action by the plaintiff, a defeated candidate, at an election for the Local Legislature, against the defendant, the returning officer, for wilfully contravening the provisions of R. S. O. ch. 10, sec. 125, in not delaying his return after receiving notice from the County Judge of a recount of the ballots.

The County Judge had mailed a notice to the defendant, which it was not controverted had reached him in time, and a duplicate of it was left at his residence with his wife.

Held, affirming the judgment of WILSON, C.J., at the trial, CAMERON, C.J., *dubitante*, that the evidence, set out below, did not shew that the notice came to defendant's know-

ledge before he made his return, and therefore he did not contravene the section, so that there could be no recovery.

Per CAMERON, C.J., doubting, on the ground that the defendant had not affirmed by his oath that the fact of a recount did not come to his knowledge before he made his return.

Held, also, *per* WILSON, C.J., that the plaintiff was a "person aggrieved" within sec. 181 of the Act; and that the defendant could not question the power of the County Judge to give the appointment or issue the notice on the material before him, because the process of the Court or Judge must be obeyed while it stands when as here was jurisdiction. *Hays v. Armstrong*, 621

Attempt to bribe members of.]—See CRIMINAL LAW, 3.

PARTNERSHIP.

1. *Partners—Contract—Sale of business—Joint and several liability—Breach by one covenantor of joint contract not to trade.]—S. and H., trading partners, sold out their business to E. under a written agreement, as follows:—"S. and H. do hereby bind themselves to E., under a penalty of \$2,000, that they will not do business in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M.*

Held, that this did not amount to a breach of the above agreement, though the matter was not free from doubt.

Semble, the rule stated in *Rules on Covenants*, 4th ed., p. 536, that when two persons jointly covenant

with another, a joint action lies for the covenantee on a breach of covenant by one of the covenantees only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements in the absence of language imputing such suretyship in regard to future acts or breaches. *Elliott v. Stanley et al.*

2. *Partnership — Accommodation endorsement—Right to recover.*]—The plaintiffs discounted a note for J. N., the maker, payable to and endorsed by a firm in the partnership name by one of the partners, the plaintiffs knowing that it was so endorsed as security for J. N., and having no reason to suppose that it was in connection with the partnership business.

Held, that the other partners were not liable. *Federal Bank v. Northwood et al.*, 389.

PATENT OF INVENTION.

1. *Patent of invention—35 Vic. ch. 26, (D.)—Delivery of model.*]—*Held*, that 35 Vic., ch. 26 (D), does not require delivery of a model prior to the issue of a patent of invention.

In this case after the granting of the patent the Commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of the model, which was sent, and the patent was then forwarded.

Semble, that delivery of the model prior to the grant of the patent was dispensed with, merely requiring it to be sent before the patent would be forwarded. *Regina v. Smith*, 440.

2. *Patent Act of 1870—Court, constitution of—Dominion Parliament—Ultra vires—Power of Minister—Prohibition.*]—Sec. 28 of the Patent Act of 1872, after specifying certain cases in which patents are to be null and void, provided that in case disputes shall arise under this section as to whether a patent has or has not become void, such disputes shall be settled by the Minister of Agriculture or his Deputy, whose decision shall be final.

Held, that a Court or judicial tribunal for the determination of the matters referred in the section was constituted by the Act; that the constitution of such a court was not *ultra vires* of the Dominion Parliament as infringing Provincial legislation; and that it was competent for the Minister to decide as to the existence of disputes arising for his decision. Prohibition therefore was refused. *In re The Bell Telephone Company and the Telephone Manufacturing Company and The Minister of Agriculture*, 605.

PAYMENT.

Of mortgage money.]—See MORTGAGE.

PLAN.

Sale according to—Rights of purchaser.]—See SALE OF LANDS, 2.

PLEADING.

See CRIMINAL LAW, 1, 3.

PRESSURE.

See BANKRUPTCY AND INSOLVENCY, 1, 2.

PRINCIPAL AND AGENT.

1. *Contract for sale of land—Authority to make—Agency—Variation in acceptance of terms of offer.*]—C. R. S., being the owner of certain leasehold property, wrote E. E. K., a land agent, a letter in these words: "Please call on J. J. R. He keeps a small shop * *. He resides in my house on P. street, and has been wanting to purchase it for some time. Tell him if he gives me \$235, cash at once I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following date E. E. K. wrote J. J. R. as follows: "Mr. S. of Meaford wishes me to say that if you desire to purchase some property he owns on P. street, that if you give him \$235 cash he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after an acceptance was endorsed on the latter letter in these words: "I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R.

Upon an action being brought for specific performance by J. J. R., against C. R. S. it was

Held, that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property.

Held, also, that even if there had been no question as to the authority of E. E. K., the insertion of the words "on the understanding that I pay no expenses," in the acceptance prevented it from being considered

an acceptance of the offer said to be contained in the letter of E. E. K. *Ryan v. Sing*, 266.

2. *Possession of mortgage not sufficient authority to agent to receive mortgage money.*]—See MORTGAGE.

PRINCIPAL AND SURETY.

Principal and surety—Bond guaranteeing good conduct of bank cashier—Negligence of obligees—Connivance—Onus—Production of documents—Death of surety—Continuing guarantee.]—In an action against the sureties under a bond guaranteeing the honesty of one M. as cashier of the plaintiffs' bank, charging misappropriation of funds by M., the defendants set up, as a bar to recovery, neglect of the directors of the bank in not examining the books, so as to detect any malversation on M.'s part.

Held, that to sustain this defence the sureties must shew connivance between the plaintiffs and M., or a very strong case of negligence, which they had not done in the present case.

The chief reliance of the surety, in such a case, ought to be, in the honesty of the man whose honesty he has guaranteed.

It is not sufficient for a party to any litigation on whom the *onus* is to say that he could furnish the necessary proof if he had certain papers. It is his duty to have these papers, or to have them produced, the means of causing their production being what the law deems ample.

When the engagement of a surety is a contract and not a bare authority, it is not usually revoked by his death, and his estate remains liable to the same extent as he would have been if he had lived. *Exchange Bank of*

Canada v. Springer et al., 309. *Exchange Bank of Canada v. Barnes et al.*, 309.

See PARTNERSHIP, 1.

RAILWAYS AND RAILWAY COMPANIES.

1. *Sub-way construction of—Adjoining Municipalities*—46 Vic. ch. 45, (O.)—*Railway Committee of Privy Council—Order in Council*—46 Vic. ch. 24, (D)—*Railways—Municipality performing work outside its limits—Ultra vires—Liability as wrongdoer.*—T. and P., being adjoining municipalities obtained a special Act 46 Vic. ch. 45, (O.) providing for the construction of certain railway sub-ways, part of which had to be constructed in each municipality. P. having disagreed with T. as to the terms, joined the railway companies in an application to the Railway Committee of the Dominion Parliament and obtained an order in Council under 46 Vic. ch. 24, (D.) authorizing the companies to do the work which P. under an agreement with the companies undertook to do and commenced.

W. being a property owner in the municipality of T. in the neighbourhood of the works whose access to his property was cut off by the works brought an action for compensation under the special Act, which was resisted by P. on the ground that they were proceeding under the order in Council under the Railway Act, and that no compensation could be claimed except for land *taken*, which was not done in this case.

Held, that the work was not being done by P. under the special Act, as it gave no power for one

municipality to do the work required in the other, and that each municipality should have contracted for the work to be done within its own limits; and that before the work was let, the councils of the respective municipalities should have agreed upon the proportions in which the cost thereof including compensation for damages * * and the cost of future maintenance, should be divided and borne between the said municipalities, which was not done.

Held, also, that the work was not done under the order in Council as the powers of the Railway Committee are exercised and exercisable only upon, against, and with respect to railway companies; that the Railway Committee have no power to direct a municipality, or any body or person to do any of the work, or bear any of the expense of any works which the companies may be required to do, and that the order in Council did not direct P. to do any of the work or bear any part of the expense thereof.

Held, therefore, that P. was a wrongdoer, and answerable as such for the damage caused to the plaintiff, and bound to make compensation therefor. *West v. Parkdale et al.*, 270, and *Carroll et al. v. Parkdale et al.*, 270.

(Since reversed on appeal, HAGARTY, C. J., dissenting.)

2. *Agreement to run trains—Impossibility of performance—Specific performance—Breach.*—The defendants covenanted by deed with the plaintiffs, for valuable consideration, that all their passenger trains should run to and from a small station in C. street, in the city of S., for the purpose of checking baggage, and of accommodating passengers. For about a year they ran the trains pursuant

to their covenant, but subsequently ceased to do so. It appeared that in order to continue to perform the contract the defendants would either have to obtain running powers from the C. S. R. Company, who owned the station in C. street, or else to build a new line for a considerable distance, involving great expense and difficulty, the crossing of two railways, and the doing of such continuous daily acts as are usually done at a railway station for passengers.

Held, that there had been a breach of the agreement.

Held, however, that, under the above circumstances, specific performance could not be granted, and the plaintiffs must be left to their remedy in damages.

Lytton v. The Great Northern R. W. Co., 2 K. & J. 394; and *Wallace v. The Great Western R. W. Co.*, 3 A. R. 44, distinguished. *The Municipal Corporation of the City of St. Thomas v. The Credit Valley Railway Company*, 332.

(Affirmed in appeal.)

3. 42 Vic., ch. 9, 46 Vic., ch. 24 (D.)—*Liability to fence.*—*Held*, O'Connor, J., dissenting, that under the Consolidated Railway Act 1879, 42 Vic., ch. 9 (D.), as amended by 46 Vic. ch. 24 (D.), the railway company are not bound to fence except as against a "proprietor or tenant" in occupation, and that the company are not liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him.

The meaning of the terms "Proprietor," "Tenant," and "Occupant," considered. *Conway v. Canada Pacific Railway Company*, 673.

Debentures—*Issue in blank*—*Subsequent insertion of payee's name*—

Estoppel—"Negotiating"—38 Vic. c. 47 O.]—*See* DEBENTURES.

RECTORIES.

See CHURCHES, 3, 4.

RELEASE.

Of Legatee.]—*See* LEGACY.

RELIGIOUS BODIES.

See CHURCHES, 1, 2, 3, 4.

RETURNING OFFICER.

See PARLIAMENT.

SALE OF GOODS.

Stoppage in transitu—*Goods entered and duty paid*—*Refusal by carriers to deliver.*]—The plaintiffs, merchants in Boston, sold and consigned goods to J. C. & Son, in Toronto. While the goods were held by the railway company in T., J. C. & Son assigned to the defendant as trustee for the benefit of creditors. The defendant, immediately after the assignment, passed and entered the goods, and paid the duty thereon, and the railway company removed the goods from the Customs warehouse to their freight sheds, where they remained, and delivery was refused to the defendant for non-production by him of a bill of lading, and the freight was not paid or tendered. The plaintiff having stopped the goods,

Held, that the *transitus* was not at an end, for that the railway com-

pany continued to hold the goods as carriers, and not as agents for the defendant.

The plaintiffs had, before they stopped the goods *in transitu*, proved their claim for the goods on the estate of J. C. & Son.

Held, that this did not deprive them of their rights as lien holders, or affect their right to stop the goods *in transitu*. *The Morgan Envelope Co. v. Boustead*, 697.

SALE OF LANDS.

1. *Reference as to title—When good title first shewn—Registration of deed to vendor—When interest begins to run—Costs.*—On a reference as to title under a judgment which contained this clause: "And in case a good title can be made, an enquiry when it was first shewn that such good title can be made." It was

Held, that these words meant, when was a good title first shewn upon the abstract.

Held, also, that a vendor does not complete his title until his deed is registered; *i. e.*, that registration is essential to the title.

A purchaser becomes liable to pay interest, when no time is fixed by the contract, from the time when he could prudently take possession, and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made.

The ordinary rule in a vendor's suit is, that the costs are given against him up to the time when he has first shewn a good title; but where the question as to title is not the chief matter in dispute the costs will follow the result.

Where a purchaser's objections to the title have caused the litigation and have been overruled, he will be liable for costs, notwithstanding any decision in his favour on particular points in dispute. *Laird v. Paton*, 137.

2. *Vendor and purchaser—Sale according to a plan—Leaseholds—Rights of purchaser—Notice—Parties.*—The City of Toronto laid out a block of land in three rows of lots, one row fronting to the south on B. street; another row fronting to the west on H. street; and another row fronting to the north on C. street, with a lane twenty feet wide running round the block in the rear of the lots, and on May 18th, 1881, sold certain of these lots by public auction.

A plan of the land was exhibited at the sale, and copies given to the bidders, and the sale was made according to this plan, which was incorporated in the contracts of purchase. C. bought lot 10 fronting to the south; and M. bought all the lots fronting to the west, signing a similar contract in respect to them. A lease of his lots was, on June 14th, 1881, granted to M. by the city, not according to the plan incorporated in the contract of purchase, but according to a plan, registered as No. 352, subsequently prepared, in which the lane in rear of M.'s lots was not shewn. On May 19th, 1882, C. accepted a lease of his lot No. 10, expressed to be a lease of "lot 10 according to registered plans numbers 352 and 380," which latter was similar to that incorporated in the contract of purchase at the sale. Subsequently M., with full notice of C.'s purchase, and that he claimed the right to have the lane behind M.'s lots kept open, closed it up, and C.

now brought this action to compel him to re-open it.

Held, that C.'s rights under his lease were the same as if he had been given, immediately after his purchase, a lease according to a plan identical with that by which he made his purchase; that M. could have acquired no rights against him by reason of anything done since the purchase, and plan 380 must be considered as incorporated in C.'s lease.

Held, therefore, that C. was entitled to the benefit of the lanes all round the block, and had a right to maintain this action and compel M. to remove the fences placed by him in obstruction of the lane behind the lots purchased by him, M., and that without making the other purchasers at the sale parties. *Carey v. The City of Toronto*, 195.

This case was reversed in appeal.

3. *Acceptance by letter—The parties differing in their understanding of the offer—Not specifically enforced.*] See CONTRACT, 2.

4. *Under fi. fa. before return of nulla bona.*]—See EXECUTION, 1, 2.

5. *Authority to make contract for—Agency—Variation in acceptance of terms of offer.*]—See PRINCIPAL AND AGENT, 1.

SEAL.

Contract not under—Liability of Municipal Corporation.]—See CORPORATIONS, 5.

SESSIONS.

Temporary judicial district of Nipissing—Appeal to Quarter Sessions

of Renfrew—Grouping Clauses Act—R. S. O. ch. 42.]—Two justices appointed in 1880 for the temporary judicial district of Nipissing, made a conviction in the said district of one M. for an assault committed there.

Held, that no appeal would lie under 9 Vic. ch. 41, now Consol. Stat. C. ch. 101, sec. 4, to the General Sessions of the County of Renfrew, being the nearest to the place of conviction, for the justices were not appointed under that Act, but under the R. S. O. ch. 71. and the place of conviction was not within any part of Canada defined and declared by proclamation under that Act.

Held, also, *per* CAMERON and O'CONNOR, JJ., that the County Judge of the County of Lanark had no power to preside at the Sessions in the County of Renfrew, the Provincial Statute authorizing him to do so being *ultra vires*. WILSON, C.J., upon this point gave no positive opinion, but inclined to the opposite view. *Gibson v. McDonald*, 401.

SEWERS.

See WATERS AND WATERCOURSES, 1.

SHERIFF.

False return—Chattel mortgage—Description in—Liability of sheriff.]—See BILLS OF SALE AND CHATTEL MORTGAGES.

See EXECUTION, 1, 2

SHIPPING.

Charter—Demurrage—Computation of Time—Sunday.]—*Held*, re-

versing the judgment of ARMOUR, J., at the trial (ARMOUR, J., dissenting,) that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed. *Gibbon v. Michael's Bay Lumber Co., (Limited)*, 746.

SPECIFIC PERFORMANCE.

Absence of common intention and understanding.—See CONTRACT, 2.

Agreement to run trains—Impossibility of performance—Specific performance—Breach.—See RAILWAYS AND RAILWAY COMPANIES, 2.

STATUTES, CONSTRUCTION OF.

Semble, 40 Vic. c. 8, s. 30 (O.), is prospective and not retrospective in this sense that it would not make valid the appointment of trustees made prior to its passing without authority. *McLachlin et al., v. Usborne et al.*—*Magee v. Usborne et al.*, 297.

11 Geo. 2, c. 19, s. 4, *Imp.*—See JUSTICES OF THE PEACE, 3.

31 Geo. 3, c. 31, *Imp.*—See CHURCHES, 3.

43 Geo. 3, c. 1.—See EXECUTIONS, 2.

C. S. C. c. 74.—See CHURCHES, 4.

C. S. C. c. 101, s. 4.—See SESSIONS.

3-4 Vic. c. 35.—See CHURCHES, 3.

16 Vic. c. 182, s. 55.—See ASSESSMENT AND TAXES, 1.

17-18 Vic. c. 118.—See CHURCHES, 3.
27 Vic. c. 57, s. 10.—See ATTACHMENT OF DEBTS,

29-30 Vic. c. 16.—See CHURCHES, 4.

29-30 Vic. c. 118.—See CHURCHES, 3.

32-33 Vic. c. 28 D.—See JUSTICES OF THE PEACE, 1.

35 Vic. c. 26 D.—See PATENTS OF INVENTION, 1.

38 Vic. c. 47 O.—See DEBENTURES.

40 Vic. c. 43, s. 47, D.—See CORPORATIONS, 3.

R. S. O. c. 10, ss. 125, 181.—See PARLIAMENT.

R. S. O. c. 12, ss. 45, 46, 47, 48.—See CRIMINAL LAW, 3.

R. S. O. c. 23, s. 47.—See WATERS AND WATER COURSES, 2.

R. S. O. c. 40, s. 48.—See HUSBAND AND WIFE, 4.

R. S. O. c. 42.—See SESSIONS.

R. S. O. c. 50, s. 383.—See HUSBAND AND WIFE, 2.

R. S. O. c. 66.—See EXECUTION, 1, 2.

R. S. O. c. 71.—See SESSIONS.

R. S. O. c. 107, s. 30.1—See TRUSTS AND TRUSTEES.

R. S. O. c. 109.—See VENDORS AND PURCHASERS' ACT — ASSESSMENT AND TAXES, 1.

R. S. O. c. 111, s. 84.—See WAYS, 1.

R. S. O. c. 118.—See BANKRUPTCY AND INSOLVENCY, 1.

R. S. O. c. 125, s. 7.—See HUSBAND AND WIFE, 2.

R. S. O. c. 174, s. 506.—See WAYS, 1.

R. S. O. c. 181, ss. 51, 59, 85.—See TAVERNS AND SHOPS.

R. S. O. c. 216, s. 10.—See CHURCHES, 1.

40 Vic. c. 8, s. 30, O.—See TRUSTS AND TRUSTEES.

42 Vic. c. 9, D.—See RAILWAYS AND RAILWAY COMPANIES, 3.

43 Vic. c. 27 O.—See ASSESSMENT AND TAXES, 2.

O. J. A. Rule 321.—See HUSBAND AND WIFE, 2.

46 Vic. c. 24 D.—See RAILWAYS AND RAILWAY COMPANIES, 1, 3.

46 Vic. c. 45, O.—See RAILWAYS AND RAILWAY COMPANIES, 1, 3.

46 Vic. c. 58, O.—See CORPORATIONS, 1.

STOCK.

1. *Subscriber to stock book—Allotment of shares—Winding up—Contributories.*—See CORPORATIONS, 1.

2. *Action for unpaid shares — Foreign company.*]—See CORPORATIONS, 2.

3. *Contributories.*]—See CORPORATIONS, 3.

STOPPAGE IN TRANSITU.

See SALE OF GOODS.

SUNDAY.

Counting Sunday in computation of time.]—See SHIPPING.

SURETY.

See PRINCIPAL AND SURETY.

TAVERNS AND SHOPS.

Liquor License Act—Conviction by two magistrates—Onus of proving license—Imprisonment in default of distress—Selling liquor to Indian.]—A conviction under R. S. O. ch. 181, for selling liquor without a license, purporting to be made by three magistrates, but signed by two only, was returned with a *certiorari*.

Held, if an objection at all, a ground for sending back the writ, that the third magistrate might sign the conviction, but not a ground for quashing it.

By R. S. O. ch. 181, sec. 85, where the act or omission complained of is one for which, if the defendant were not duly licensed, he would be liable to a penalty under the Act, the burden of proving that he licensed is on the defendant.

Held, no objection to a conviction

that it did not show defendant was not licensed.

A penalty of thirty days imprisonment in default of sufficient distress for the fine was imposed.

Held, good, under sections 51 and 59 of the Act.

The offence was selling liquor to an Indian.

Held, no objection to a conviction under R. S. O. ch. 181, for if so the defendant was guilty of two offences, one under the latter Act, and one under the Indian Act. *Regina v. Young*, 88.

TIME.

Computation of, for demurrage.]—See SHIPPING.

TORONTO, CITY OF.

See WATERS AND WATERCOURSES.

TRIAL

See VERDICT.

TRUSTS AND TRUSTEES.

Will — Power to appoint new trustees—Payment to retired trustee — Husbands as trustees for their wives—40 Vic c. 8, s. 30, O.—R. S. O. c. 107, s. 30.]—A testator devised certain properties to H. F. M., J. H. M., and D. M., as tenants in common, and charged the same with \$100,000 to be paid by them to his son and two daughters, married women, share and share alike, through his wife, M. M., as trustee as therein mentioned; and directed

that at the death of M. M. the said \$100,000 should be held by the said devisees and their survivors on the trusts of the will, "unless my said wife shall have previously appointed, by will or otherwise, any other person or persons to be a trustee in her place, which I hereby authorize and give her power to do."

On November 5th, 1873. M. M. by deed professed to nominate and appoint L. R. and J. U., to be trustees in her place under the will, and afterwards by another deed of October 6th, 1877, again appointed L. R. and J. U. to be such trustees.

Held, that the will only authorized M. M. to appoint a trustee to be such after her death, and neither of the above appointments of L. R. and J. U. were authorized by the will.

Held, however, that although R. S. O. c. 107, s. 30, could not be invoked to authorize either appointment, since it did not come into force till December 31st, 1877, yet under 40 Vic. c. 8, s. 30, O., assented to on March 2nd, 1877, the latter appointment was a good and valid one, for that Act applies to the case of a trustee appointed before the passing of it, who desires to be discharged from the trust, and consequently money paid to M. M. as such trustee, after the appointment of October 6th, 1877, did not discharge the debt.

40 Vic. c. 8, s. 30, O., is very broad in its language, and a trustee who has from the beginning been a sole trustee, has, under it, the same position and power as a last retiring trustee, or a sole surviving trustee; that 40 Vic. c. 8, s. 30, O., is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority.

Held, also, that the fact that L. R. and J. U. were the husbands of

the female *cestuis que trust*, although it appeared from the will that the testator intended that the legacies should be free from the control of any present or future husband, did not make the appointment of them bad, although it might be that if the Court were appointing trustees of the fund, the husbands of the *cestuis que trust* would not be appointed. *McLachlin et al. v. Usborne et al.*, 297. *Magee v. Usborne et al.*, 297.

See CHURCHES, 1, 3, 4—EXECUTORS AND ADMINISTRATORS, 2—LEGACY.

VENDORS AND PURCHASERS.

Making title.]—See SALE OF LANDS, 1.

VERDICT.

Libel—*Separation of jury after Judge's charge*—*Consent of counsel*—*Delegation of counsel's authority*—*Possibility of outside influence*—*Refusal to interfere with verdict.*]—In an action for libel, after the charge of the Judge, the jury were allowed to separate with the consent of the counsel for the plaintiff and for two of the defendants, the counsel for the other defendant P. having left Court before the Judge's charge, but before leaving having authorized F., the counsel for the defendants in the same interest with P., to take on his behalf any objections he might think proper to the charge. Before re-assembling some comments on the case, very prejudicial to the defendant P., were published by the *Mail newspaper* which the jury might have had the opportunity of reading.

On re-assembling the jury found a verdict against the defendant P.

The Court not being satisfied that P.'s counsel, as represented by F., did not assent to the separation of the jury, refused to disturb the verdict. *Stilwell v. Rennie et al*, 355.

(Reversed in part in appeal)

WATERS AND WATER-COURSES.

1. *Drainage by-law—Use of sewer without leave—Validity of by-law.*]

A municipal corporation passed a by-law for the construction of a sewer without limiting the purposes for which it was to be used, and subsequently passed another by-law regulating how it might be tapped for drainage purposes, and enacting that no one should drain into it without permission from the municipal council first obtained, and specifying a certain rate of payment for the use of it when so permitted. The applicant got no leave from the council or any committee thereof to use the sewer, but several members of the council gave him permission to connect some waterclosets with it on condition of his paying, whenever called upon, whatever was reasonable for the privilege :

Held, that the sewer was constructed for general drainage purposes, including that of waterclosets; but that the permission given to the applicant so to use it did not bind the council, which could compel him to cut off the connection, as he had not obtained their consent to make the same, nor paid the rate fixed by the by-law ; and that the fact of his having enjoyed the privilege for several years did not place him in any better position than he was at the first.

Semble, that even if he had the legal right to use the sewer, either the corporation or the local board of health could, upon the facts stated below, under 47 Vic. ch. 32, sec. 13, and ch. 38, sec. 12, have passed a by-law compelling him to cut off his connection.

Quære, whether after the formation of the local board of health the by-laws provided for by 47 Vic. ch. 32, sec. 13, should be passed by the corporation or by the board of health under ch. 38, sec. 12. The motion to quash the by-law was therefore refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation. *In re Workman and The Corporation of the Town of Lindsay*, 425.

2. *Water lots—Easement—Enjoyment as of right.*]

A. was lessee for years of the west half, which was practically vacant, of water lot 17, Toronto harbour, B. proprietor of the east half of the same lot, on which, erected more than twenty years before action, were a wharf and storehouse, so near the dividing line of the half lots that vessels could not call at the west side of the wharf, where all the business was done, without passing over the half lot of A. and partially occupying the same while lying at the wharf. B. and his successors had also laid up vessels at their wharf in winter, two or three abreast, occupying part of A.'s half lot nearly every year since the erection of the wharf, and about eighteen years before action built on the wharf an elevator for receiving and shipping grain at the west side of the wharf.

In 1883 A. put up a notice warning persons against trespassing on his half lot, which vessels passing to

B.'s lot knocked down. Subsequently, in the same year, A. drove piles into the soil of his own half lot, ostensibly as a foundation for boat houses, and was about to drive others, to the obstruction of the approach to B.'s wharf, when B., to meet this, began moving vessels to and from his wharf, and finally moving them to his wharf and extending into the waters on A.'s lot, thus preventing him from driving more piles. In trespass by the plaintiff, B. claimed, first, an easement by prescription and non-existing grant to the owners of the fee—whose lessee, Taylor, who erected said wharf, was—over A.'s lot to the extent necessary to allow vessels to pass to and from his wharf, and to lie up there; secondly, that the waters covering said water lot were navigable waters, part of Lake Ontario and Toronto harbour, and that the wharf was a construction within the law for the purposes of enabling the harbour to be used, and the safe and useful navigation of said waters, and that the act of A. was a wrongful interference and an obstruction of the use of the said navigable waters, which B. was entitled to abate.

Held, 1. That the waters covering said lot seventeen were part of the navigable waters of Lake Ontario, and the same law was applicable thereto as in the case of tidal waters, in the absence of a valid grant the soil being vested in the Crown and subject to the *jus publicum* of navigation.

2. That the Act 23 Vic. ch. 2, sec. 35, R. S. O. ch. 23. sec. 47, gives to the Crown authority to grant water lots, and the grant of water lot 17 by the description, "land covered with water," was valid under these enactments, and sufficient to

pass to the grantee and his representatives, the soil and the *jus publicum* for navigation and the like in the water, which could be built upon, filled up, or otherwise dealt with as might be thought proper.

3. That so long as A.'s water was unenclosed or unoccupied any one might pass over or across it without being liable to be treated as a trespasser, and an easement such as that claimed could not therefore be acquired.

4. That the claim to an easement was not founded on an enjoyment *nec clam, nec vi, nec precario*, and was therefore not as of right, and could not be sustained.

5. That the evidence shewed the user of the plaintiff's water lot was not as of right, and the finding of the jury was warranted by the evidence.

6. That neither the erection of the wharf nor its long use, nor the erection of the elevator, shewed such a claim of enjoyment as of right as to satisfy the statute.

7. That in any event the claim was of an easement in gross, and therefore invalid.

8. That the verdict, upon the evidence set out below, should have been against the defendants in any event, because they were not making use of the waters for the purposes of trade and commerce when they anchored the vessels upon the lot.

9. That the patent to the city of Toronto of the water lots, confirmed by the esplanade legislation, gave to the owners of water lots the right to fill in their lots, and turn them into land. *George Warin et al. v. The London and Canadian Loan and Agency Co. et al.*, 706.

WATER LOTS.

See WATERS AND WATERCOURSES.

WAYS

1. *Order amending plan by closing street, R. S. O. c. 111, s. 84—By-law declaring street open—Municipal Institutions Act, R. S. O. c. 174, s. 506—Quashing by-law.*]—By an order of the County Judge, upon the application of the plaintiff, after hearing numerous parties, including the defendants, a certain street on a registered plan was closed up. Thereafter the defendant municipality passed a by-law declaring the street in question open. On a motion to quash the by-law,

Held, that the by-law should be quashed, as having been passed in disregard and contempt of the order.

Held, also, that as the order shewed jurisdiction on its face, the evidence upon which it had been made should not be looked at on this application. *Waldie v. Burlington*, 192.

2. *Municipal corporation—Badly constructed sidewalk—Ice on sidewalk—Negligence.*]—A sidewalk in the town of Prescott was so constructed by the corporation that a portion of it slanted or declined lengthwise from west to east to the extent of eight or nine inches in a few feet. On this incline snow and ice had been allowed to accumulate, and formed a ridge of hard beaten frozen snow for a considerable distance on the sidewalk. The plaintiff, who was walking at the time from west to east, fell upon the incline, and was injured.

Held, that the defendants were liable.

Burns v. City of Toronto, 42 U. C. R. 560, and *Skelton v. Thompson*, 3 O. R. 11, distinguished. *Bleakely v. Town of Prescott*, 261.

3. *Opening lane.*]—See SALE OF LANDS.

See RAILWAYS AND RAILWAY COMPANIES, 1.

WILL.

1. *Child—Life estate—Estate in fee.*]—T. S., after providing for his widow in his will, made the following devise: "And I give and devise to my nephew, R. S., lot No. 30, in the 2nd con., said township of Etobicoke, during the term of his natural life, (excepting he have a child or children) if not at the expiration of his life to go to my daughter Ann Guardhouse or her heirs, &c., * *." The will also contained a residuary devise in favour of the testator's widow. R. S. took possession, married, had children, and died leaving his widow and several children.

In an action by the widow of T. S., claiming that R. S. was only entitled to a life estate in the lot and that she was entitled to it in fee under the residuary clause. It was

Held, following *Lethicoullieur v. Tracy*, 3 Atk. 796, that an estate in fee might by implication be vested in the child, or that the testator's intention might be properly effectuated by applying the rule in *Bisfield's Case*, (acted upon in *Doe d. Jones v. Davies*, 4 B. & Ad. 55), and reading "child or children" as *nomen collectivum*, and so creating an estate tail in R. S. Under the circumstances in this case "child" was not a *designatio personarum*, but compre-

hended a class, and therefore the plaintiff must fail. *Stobbart v. Guardhouse*, 239.

2. *Devises to Charities — Mortmain—Failure of bequests—Incorporated Synods—Power to hold in Mortmain*—R. P. L., by his will directed his executors “by and out of the moneys which shall be received by them from the P. B. & M. Co., for or on account of the debt or sum of \$35,000 owing and secured by mortgage by that Company to me at the time of my decease, and of the interest thereof which shall accrue after my decease, in the first place to pay the sum of \$1,500, part thereof to the Bishop for the time being of Algoma in Canada, to be invested by him in or upon any of the investments hereinafter authorized with power for the Bishop of Algoma aforesaid for the time being, from time to time to vary and transpose the investments thereof at his discretion for any other or others of the kind prescribed and the income of such investments to be applied in and for the education and qualifying of John Eskinah an Algoma Indian, at present of the Shingwauk Home, Sault Saint Marie, Algoma, aforesaid, (heretofore supported by me) as and for a Missionary in the Diocese of Algoma aforesaid, for and during, and until such time as the Bishop of the said Diocese for the time being shall consider sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying to apply such income as aforesaid forever thereafter from time to time in and for the education and qualifying of some other person to be nominated by such Bishop for the time being for a like purpose, and during such time as he shall think proper; but for which applications

the Trustees and Executors shall not be responsible. And after payment of the aforesaid legacy I give and bequeath the following legacies to be paid out of the same fund or moneys, namely :

“To the Treasurer for the time being of the Algoma Missions in British America the sum of \$1,500 of Canadian Currency for the benefit of those Missions.

“To the Treasurer for the time being of the Huron Missions in British America, the sum of \$1,500 of the aforesaid Currency for the benefit of those Missions.

“And to the Treasurer for the time being of the Ontario Missions in British America, the sum of \$2,500 of the aforesaid Currency for the benefit of those Missions.”

Held, that the bequest to the Bishop of Algoma for the benefit and education of John Eskinah and others was intended to set apart a fund which was to have perpetual continuance and in which no individual was to have a personal right, and following *Gillam v. Taylor*, L. R. 16, Eq. 584, such bequest was void.

Held, also, that the bequest to the Treasurer for the Algoma Missions was a charitable gift and must fail, because no person or body was empowered to hold it as against the Statute of Mortmain, 9 Geo. 2 ch. 36, inasmuch as there was no incorporation of Algoma for Ecclesiastical or Missionary purposes with such powers.

Held, also, that the bequests to the Treasurers of the Huron and Ontario Missions respectively were intended for the Missions sustained by the Incorporated Synods of the Dioceses of Huron and Ontario, and that by virtue of their Acts of Incorporation both these Dioceses were enabled to hold lands, &c., in Mort-

main, and that such bequests therefore did not fail either for uncertainty or because they could not be held by the defendants the Synods respectively. *Labatt v. Campbell*, 250.

3. *Construction—Parent and child—Maintenance of infants—Reference—Practice.*—A testator willed as follows: "I give, devise, and bequeath to my executor and executrix," (of whom one was the plaintiff, the testator's widow) "all my real and personal property of every kind whatsoever, for the benefit of my children, share and share alike, and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my children and my wife while she remains my widow."

Held, in an action brought by the widow, that under the above will, she and the children took the real and personal property jointly, she during widowhood, and they share and share alike absolutely; that she did not take an immediate estate in the whole with reversion to her children.

Held, also, that a reference might be directed similar to that in *Maberley v. Turton*, 14 Ves. 499, to ascertain whether it would have been reasonable and proper in the trustees to apply any or what part of the land, having regard to the situation and circumstances of the children, to their support and maintenance, and a declaration made that the sum which the Master should find to

have been properly expended by the mother in past maintenance formed a charge upon the inheritance of the children respectively in the land, but as the directions of the will had not been observed, the enquiry must be at the expense of the mother. *Donald et al. v. Donald et al.*, 669.

See TRUSTS AND TRUSTEES—DOWER, 1, 2—EXECUTORS AND ADMINISTRATORS, 2—LEGACY.

WINDING UP ACTS.

See CORPORATIONS, 1, 4.

WORDS, CONSTRUCTION OF.

"*Child.*"—See WILL, 1.

"*Creditor.*"—See ATTACHMENT OF DEBTS.

"*Immorality.*"—See CHURCHES, 2.

"*Negotiating.*"—See DEBENTURES.

"*Occupant.*"—See RAILWAYS AND RAILWAY COMPANIES, 3.

"*Person aggrieved.*"—See PARLIAMENT.

"*Proprietor.*"—See RAILWAYS AND RAILWAY COMPANIES, 3.

"*Tenant.*"—See RAILWAYS AND RAILWAY COMPANIES, 3.

"*Without prejudice.*"—See CONTRACT, 2.

